Central Law Journal.

ST. LOUIS, MO., AUGUST 3, 1906.

A BAD DECISION IN REGARD TO SUITS BROUGHT TO RECOVER IN CONTRACTS FOR DELIVERY OF GOODS IN INSTALLMENTS.

In an editorial we criticised the conclusion of the New York Supreme Court in the case of Pakas v. Hollingshead, 99 N. Y. App. Div. 472, 61 Cent. L. J. 281. In the June number of the *Harvard Law Review*, Vol. 19, p. 619, it appears that the same criticism was made and that since then the case has been heard in the court of appeals and the judgment of the supreme court affirmed. It was a case where the defendant agreed to furnish plaintiff with 50,000 pairs of bicycle pedals to be delivered in installments and paid for upon delivery of each installment. Before the time for final delivery, the defendant having failed to comply with the contract, suit was brought and damages were recovered for a part of the installments not delivered. Afterwards another suit was brought to recover for the default on the remainder of the installments not delivered. The court held that the former judgment was a bar to a recovery in the second. The reason given was that a recovery might have been had as for a total breach in the first instance and having failed to base a suit upon this theory further action was barred. That is to say, the plaintiff, by such proceeding was bound to regard the contract as at an end, whether he wanted to or not, if he sought to recover the damages accrued at the time of bringing his action. This rule would apply to a ten-year contract, as well as one that was to be fulfilled within a year or less time. Mr. Justice O'Brien says (p. 42), "the cases bearing upon this subject have been fully collated in 2 Black on Judgments (sec. 734), where the rule is stated in these words: 'When a demand or right of action is in its nature entire and indivisible it cannot be split up into several causes of action and made the basis of as many separate suits, but a recovery for one part will bar a subsequent action for the whole, the residue or another part * * * if it appears that the first judgment involved the whole claim or extended to the whole subject-matter and settled the entire defense to the whole series of notes or claims, and adjudicated the whole subject-matter of a defense equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defense in judgment as in respect of other claims and defenses thereto, pertaining to the same subject-matter, then the first judgment operates as an estoppel as to the whole.'"

It would certainly seem impossible, upon such a statement of the law, to understand how the court could justify the conclusion reached by Mr. Justice O'Brien, in the principal case. Mr. Justice Cullen, in his dissenting opinion, not only points out the correct position, as matter of law, but supports it with an opinion of the New York court in the case of Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369, where it was held that: "A recovery for one breach did not bar an action for a subsequent breach, and it was said that the defendants could not relieve themselves from subsequent obligations by a payment of a gross sum as damages." We can not see where the court in the principal case, finds anything to support its conclusions in the cases cited to sustain its position. It is true, as is said by Mr. Justice Cullen in his dissenting opinion that, "they all present the question of the right of the aggrieved party on a single breach to recover as for a total abrogation of the contract, not the question whether he is obliged so to do. In fact in most of the cases it is said that the aggrieved party may elect to treat the contract as abrogated." It is also to be noted that, at the time the first suit was brought and judgment obtained the defendant had failed to deliver the installments due; that of itself did not amount to a total abrogation of the contract. Had there been a full and direct refusal not to deliver any more in the future then there would not have been any question of the total abrogation of the contract, nor would the plaintiff have had any excuse for not bringing a suit as for a total failure. This is a feature which is found in several cases of this character. In the case of Withers v. Reynolds, 2 B. & Ad. 882, in a case where delivery of loads of straw were to be in installments and each to be paid for upon delivery, Patterson, J., said: "If plaintiff had merely failed to pay for any par-

ticular load, that of itself might not have been an excuse for no more straw; but plaintiff refuses expressly to pay for the loads as delivered. The defendant, therefore, is not liable for ceasing to perform his part of the contract."

The mere fact that there had been only a failure to pay for one load upon delivery, as agreed, was not by any means conclusive evidence that the remainder of the loads in the future would not have been paid for upon delivery. The departure on the part of the New York court in the principal case is radical and sets a bad precedent which has many authorities against the position which may be found in 61 Cent. L. J. 281. But it is refreshing to note that the same question was recently before the Supreme Court of Wisconsin in the case of Gall v. Gall, 105 N. W. Rep. 953, and there decided according to the common sense of most of the courts of England and America. It is also observable from its opinions that the Court of Appeals of New York has fallen off from its high standard of the past. The opinions show anything but careful research in many instances which would seem to require it. We think the dissenting opinion of Mr. Justice Laughlin in the Supreme Court, 99 App. Div. 472, by far the best considered opinion of them all.

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY — PREFERENTIAL TRANSFER WHERE AN INSOLVENT HAS MONEY IN A BANK SUBJECT TO CHECK AND ALSO OWES BANK UPON A PROMISSORY NOTE.—These were the questions in the case of West v. Bank of Lahoma, 85 Pac. Rep. 469. The plaintiff in error, Langdon C. West, as trustee of the estate of Kasper Streich, a bankrupt, filed his petition in the district court of Garfield county to recover $1,300 from the Bank of Lahoma, which it is claimed belongs to the estate. It is alleged in the petition substantially that an involuntary petition in bankruptcy was filed against Streich on the 16th day of May, 1902, and that on July 8th following he was adjudicated a bankrupt. It is further alleged that on May 9th he borrowed from the Bank of Lahoma $1,800 and executed his note to the bank therefor, payable May 12, 1902; that Streich deposited said sum of $1,800 in the bank and was given credit therefor; that said note was secured by a chattel mortgage upon a stock of merchandise, furniture, and fixtures, situated in the storeom of Streich, in Woods county, Okla.; that on May 13, 1903, the bank, without releasing or waiving its mortgage, with the intent to receive a perference over the other creditors of Streich, and while he was insolvent, and the bank knowing he was insolvent, applied $1,300 of said deposit toward the payment of the debt due the bank upon said promissory note, and gave Streich credit on said note for said sum. The trustee in bankruptcy demanded a return of said money, and, the bank refusing to surrender the same, he demands judgment against the bank for the said sum, with interest and costs. The Bank of Lahoma demurred to the petition on the ground that the facts alleged do not constitute a cause of action in favor of the trustee in bankruptcy. The court sustained the demurrer and rendered judgment for the defendant. The plaintiff appealed. The only question presented is whether or not, under the facts stated in the petition, the trustee is entitled to recover the money which it is alleged the bank received as a preference. It is clear from the allegations that Streich, while insolvent, borrowed from the bank $1,800, and received credit in the bank as a depositor for that amount. The relation of debtor and creditor was thereby created as to this deposit. Streich owed the bank $1,800 for which the bank held his note, payable May 13th. On that day the bank gave him credit on his note for the balance of the deposit, $1,300, and charged him with that sum on his deposit account. At that time Streich was insolvent, and three days afterward his creditors began proceedings against him to have him declared a bankrupt. It cannot be questioned but that the effect of this transfer or payment to the bank had the effect to prefer the bank to the amount of the deposit of $1,300; but is it a preference prohibited by the bankruptcy law, and is the trustee entitled to recover the same?

When the result of the transactions has been to decrease the indebtedness of the insolvent to one creditor at the expense of his estate, it is a preference. *In re* Colton Export & Import Co., 121 Fed. Rep. 663, 57 C. C. A. 417; *In re* Lyon (D. C.), 114 Fed. Rep. 326; Livingston v. Heineman, 120 Fed. Rep. 786, 57 C. C. A. 154; *In re* Christensen (D. C.), 101 Fed. Rep. 802. These cases seem to settle the doctrine that a payment of money constitutes a transfer, and that, if the effect is to diminish the assets of the bankrupt and to enable the creditor who receives the transfer to obtain a greater per cent of his claim than other creditors of the same class, then such transaction is a preferential transfer. The primary test, then, is, have the creditors of the same class been deprived of anything by the transfer? If they have not, it must follow as a necessary result that the transaction is not within the denunciation of the statute.

Section 68a of the bankruptcy act (Act July 1, 1898, ch. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), is as follows: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be

stated and one debt shall be set off against the other and the balance only shall be allowed or paid." Under this section it was held by Mr. Justice Baker, in *Re* Myers (D. C.), 99 Fed. Rep. 691, that money on deposit in a bank to the credit of a bankrupt may be set off against the indebtedness of the bankrupt to the bank upon promissory notes, and in the case of *In re* Little (D. C.), 110 Fed. Rep. 621, Mr. Justice Shiras enunciated the same doctrine. The Supreme Court of the United States, in New York County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. Rep. 199, 48 L. Ed. 380, in construing this provision of the bankruptcy act, held that insolvents, by depositing money in a bank upon an open account subject to check, do not thereby make a transfer of property amounting to a preference which will deprive the bank of its right under section 68a to set off the amount of such deposit remaining to the depositor's credit on the date of the adjudication in bankruptcy, and to prove its claim against the bankrupt estate for the balance. In view of the above decisions and the common sense justice of the matter the conclusion of the court could only have been in favor of the bank.

MASTER AND SERVANT — MASTER ASSUMES RISK AFTER PROMISE TO REMEDY A DEFECT.— An interesting decision is that of Citrone v. O'Rourke Engineering Construction Co. (Sup. Ct. N. Y. App. Div.), 99 N. Y. Supp. 241, which seems to carry the law upon the question involved further than heretofore, perhaps, but, nevertheless, in view of every consideration it seems to place the responsibility upon definite grounds which can not be said of the position taken by the dissenting judges of which there were two. The facts were as follows: The plaintiff was set to work in a trench. He reported that the place was unsafe from stones above in the side of the trench that might fall on him. The trench was sheathed and braced up on each side, but not all the way to the top, and the stones were above the sheathing. The foreman in charge of the work and who employed the plaintiff told him "to go to work and after dinner he would fix it." This happened about 8:30 o'clock in the forenoon. The plaintiff went to work, induced by the promise, and the stones fell on him at 10:30 o'clock.

In commenting upon the matter Mr. Justice Gaynor said: "The master is of course always free to make an agreement with the servant relieving him permanently or for only a limited time of the risk of being hurt in his work, and thereby assuming it himself, whether such risk be inherent or from a defective condition of working place or appliance. It is upon this freedom of contract that the assumption of risk by the master always rests. Dowd v. N. Y., O. & W. R. Co., 170 N. Y. 459, 63 N. E. Rep. 541. The question in a given case therefore is simply whether such an agreement express or implied was made. It is now settled in this state by the recent case of Rice v. Eureka Paper Co., 174 N. Y. 385, 66 N. E. Rep. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585, that a mere promise by the master to the servant to repair a dangerous defect reported to him by the latter, made to induce and which does induce the servant to continue at work, amounts in law to an agreement relieving the servant from the risk and of assumption thereof by the master for the period during which the agreement continues. In the present case there is more in express words, viz., a promise to repair coupled with a request to continue work, and that there was enough to constitute such an agreement as matter of law is therefore not open to dispute. The rule laid down in Laning v. N. Y. C. R. Co., 49 N. Y. 521, 10 Am. Rep. 417, and so long followed by the trial judges, has been superseded by the Rice case. The master's inducing promise to repair, from being only a fact to be considered by the jury on the question of fact whether the servant assumed the risk of the defect (or was guilty of contributory negligence, as it is otherwise expressed), by continuing at work, as was decided in the Laning Case and in such other leading cases as Counsell v. Hall, 145 Mass. 470, 14 N. E. Rep. 530, has evolved in this state into a contract relieving the servant of the risk and of assumption thereof by the master as matter of law. The contention is, however, that although an agreement of assumption of risk was made by the master, it did not begin to run until after dinner —that it did not cover the period between the making of it and dinner time. I do not see how this can prevail. The very contrary seems to me inherent in the words and purpose of the agreement, viz., the agreement was intended to cover the period during which the servant was to be induced to work by it, viz., from the time of making it until dinner time. The purpose of the master was to induce the servant to resume work until dinner time, and he effected it by promising to repair the defect after dinner. The servant was not to be subjected to the risk after dinner, for it was then to be removed, and therefore the agreement could not be intended to cover that time."

In the dissenting opinion by Mr. Justice Jenks he says: "The plaintiff was ordered by his master to go to the bottom of a trench and to break up stones which lay there, released by blasting. While at work therein he was injured, at 10:30 a. m., by the fall of a stone out of the side of the trench. The trench was 13 or 14 feet deep and about 6 1-2 or 7 feet wide. It was held at intervals of 15 feet by braces 5 or 6 feet above the bottom. The loose stone was above the braces. The court dealt with the action as one at common law, and submitted it to the jury upon the question of a safe place to work. It further limited that single question of fact by an instruction that there was no liability unless the jury found that the master had made a promise to safeguard the sides of the trench, testified to by the plaintiff and denied by the defendant. It

then charged the jury that, if they found the promise, the question of liability depended upon the jury's determination whether the accident happened before or after the lapse of a reasonable time within which the promise could have been fulfilled. The exception taken is sufficient to raise the question as to the propriety of such instruction. In Rice v. Eureka Paper Co., 174 N. Y. 385, 397, 66 N. E. Rep. 979, 983, 62 L. R. A. 611, 95 Am. St. Rep. 585, the court per Werner, J., says: 'From the foregoing review of the authorities it is clear that, although the courts of this state have not hitherto had occasion to definitely adopt the rule under which a servant may be relieved from an assumed risk of his employment by the master's promise to remove the danger which creates the risk, the rule is so generally recognized as a part of the jurisprudence of this country, and is so strongly supported by reason and justice, as to justify its adoption by this court.'

The effect of such a promise is well stated by Holmes J., in Counsell v. Hall, 145 Mass. 470, 14 N. E. Rep. 531: 'If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the meantime, and whether he was using due care in working when he knew there was danger. But no case, we believe, has gone the length of deciding that the promise entitles the servant to recover as matter of law, which was the effect of the ruling asked.' See, too, District Columbia v. McElligott, 117 U. S. 632, 6 Sup. Ct. Rep. 884, 29 L. Ed. 946 *et seq.* The record in this case does not establish that the plaintiff had a right to assume that the repairs promised had been made, for he well understood the character of the repairs, and it is morally impossible that entering upon a trench dug 13 or 14 feet deep to work therein, with full knowledge that there were then no braces to support the stone, and remaining therein, he could have supposed that braces had been put in directly above his head during the time he was at work therein. And, on the other hand, there was no promise save the qualified one that the repairs would be made after dinner. * * * If he enter upon it induced by the promise of the master to remove it by repairs or the like, the servant may be relieved from the penalty incident to such assumption. Rice v. Eureka Paper Co., 174 N. Y. at page 397, 66 N. E. Rep. at page 983, 62 L. R. A. 611, 95 Am. St. Rep. 585. The liability of the master, despite the conduct of the servant, depends upon his express assumption of the risk. If the master by his promise elect to assume it absolutely, that is one thing; but if the master qualify his promise, and the servant choose to accept it, I do not think that the servant can assert that the assumption of the master is absolute. I fail to see a sufficient reason why the law, in disregard of the master's express qualification of his promise, should declare that the promise was general, and, in effect, declare unto the master: 'You cannot make a promise to repair at a future period, for even if you do, and it is acted upon by the servant, nevertheless you must be held upon a general promise, and your assumption of the risk perforce of the promise is absolute until a reasonable time for its fulfillment from the time it is made shall have elapsed.' In a case where the peril is still known by the servant to exist, the theory that the promise shifts the assumption of risk is based upon the proposition that the servant enters into the peril on the assurance that it is to be ended by the act of the master. If he enter it fully understanding that the period for performance fixed by the qualified promise has not begun, he has no reason to expect that the master will repair at a different period, either forthwith or presently, or within a reasonable time after the promise was made. Labatt on Master and Servant (page 1195) says: 'Ordinarily the protection afforded by the promise of a master to repair defective machinery is not postponed until after the arrival of the time at which the promise is to be performed, but commences as soon as it is made. But if the master has merely made a qualified promise to remedy a defect after the expiration of a certain period, and not till then, the servant cannot recover for an injury received before the end of that period.' "

It is impossible to escape the consideration that the promise of the foreman in the principal case induced, as it was intended to, the workman to resume his work knowing that the place was in fact dangerous, and while it is true the workman also knew it yet the assurance that it would be repaired by the foreman was an encouragement that the foreman did not regard the danger as so great, but that he could work with reasonable safety till the time fixed for repairs. When life and limb are at stake it would seem a wise precaution to place the burden upon those whose duty it is to make the place of the operation of the work as safe as may be reasonable under the circumstances, and in the principal case the attention of the foreman was called to a condition which if he had repaired at once the accident would have been averted. From a humane point of view we think the opinion of the majority is well founded and is, generally speaking, the reasonable view.

DAMAGES—TRIAL COURT INCREASING THE DAMAGES GIVEN BY THE JURY.—An interesting question is presented in the case of Ford v. Minneapolis St. Ry. Co., 107 N. W. Rep. 817. It appears that the plaintiff had been in ill health, and was convalescing from serious neurasthenia. When he was about to get on one of defendant's cars as a passenger, some one, not the plaintiff, struck an employee of the defendant who had

been sent by the company to the place to assist in handling the passengers there. That employee turned around, seized plaintiff by the throat, dragged or pushed him about 12 feet into the street gutter, and threathened to "smash his damned head." Plaintiff called to him not to strike. Plaintiff's neck was bruised or cut where the employee's fingers had dug into his flesh. The discoloration and finger marks on his throat remained for several days. The effect on plaintiff was to retard his recovery. The defense was as follows: As soon as the plaintiff said that it was not he who had struck the employee, that employee then, not knowing whether plaintiff was the assailant or not, let go of him. There was no evidence that the plaintiff lost time or recreation. He was never obliged to, and did not consult a physician with reference to his injuries. The jury returned a verdict of $1. On motion by the plaintiff the court ordered that the verdict be set aside and a new trial had, unless the defendant should, within 10 days from the date of the filing of the order, consent in writing that such verdict might be increased to the sum of $150. The appeal presents only the question whether or not the damages were inadequate. Under the circumstances of this case, the assault was tortious and plaintiff was not restricted to nominal damages. McNamara v. St. Louis Transit Co. (Mo. Sup.), 81 S. W. Rep. 880, 66 L. R. A. 486; Ickenroth v. St. Louis Transit Co. 102 Mo. App. 597, 77 S. W. Rep. 162; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 12 Am. Rep. 39; Draper v. Baker (Wis.), 21 N. W. Rep. 527; Craker v. Railway Co., 36 Wis. 657, 17 Am. Rep. 504; 3 Current Law, 325, notes 35, 36. While there is authority that a verdict in a personal injury case for an inadequate amount should not be set aside (Stroh v. S. & C. Ry. Co., (Ky.), 78 S. W. Rep. 1120; but see, *contra*, Michalke v. Galveston, etc., Ry. Co. (Tex. Civ. App.), 27 S. W. Rep. 164), the rule under express statutory provision and the decisions of this court is otherwise in this state (Henderson v. Duluth, etc., Ry. Co., 52 Minn. 479, 483, 55 N. W. Rep. 53; Lane v. Dayton, 56 Minn. 91, 57 N. W. Rep. 328; Conrad v. Dobmeier, 57 Minn. 147, 58 N. W. Rep. 870; Marsh v. Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. Rep. 630), in accordance with the almost universal holding on this subject. Thus in Sullivan v. Vicksburg, S. & P. Ry. Co., 39 La. Ann. 800, 2 So. Rep. 586, 4 Am. St. Rep. 239, it is said: "In negligence cases, the court is averse to increasing the verdicts of juries, who rarely underestimate damages; but, when the jury has failed to do justice, the court in the exercise of its jurisdiction, must do it." And see Donovan v. Gay, 97 Mo. 440, 11 S. W. Rep. 44; Fairgrieve v. City of Moberly, 29 Mo. App. 141; Ellsworth v. City of Fairbury, 41 Neb. 881, 60 N. W. Rep. 336; Miller v. Delaware, etc., Ry. Co., 58 N. J. Law, 428, 33 Atl. Rep. 950; Smith v. Dittman (Com. Pl.), 11 N. Y. Supp. 769; Brown v. Foster, 1 App. Div. 578, 37 N. Y. Supp. 502; Kelly v. City of Rochester, 30 Hun, 582, 15 N. Y. Supp. 29; Baily v. City of Cincinnati, 1 Handy (Ohio), 438; Caldwell v. Vicksburg, etc., Ry. Co., 41 La. Ann. 624, 6 So. Rep. 217; Whitney v. City of Milwaukee, 65 Wis. 409, 27 N. W. Rep. 39. The order of the trial court was a discretionary one and will not be set aside unless it affirmatively appeared that it constituted an abuse of discretion. Dunnell's Minnesota Practice, sec. 1024; Marsh v. Minneapolis B. Co., 92 Minn. 182, 99 N. W. Rep. 630; Mohr v. Williams (Minn.), 104 N. W. Rep. 12. In Marsh *v.* Minneapolis B. Co., *supra*, Lewis J., said: "It was within the reasonable discretion of the trial court to grant a new trial upon the ground that the verdict was inadequate, and the appellant was not prejudiced by the condition that it might avoid a new trial by paying $175." We are of the opinion that no abuse of discretion appears in this case.

EQUITABLE RELIEF IN ACTIONS AT LAW RELATING TO CONTRACTS OF RELEASE OBTAINED BY FRAUD AND ACTIONS AT LAW TO RECOVER DAMAGES FOR FRAUD IN SUCH CASES.

In these cases it is not necessary to return the consideration for the compromise as a condition precedent to the right to sue. In the United States courts common law and equitable actions are preserved in their purity; there is no blending of equitable actions with common law actions, though, of course, when equity takes jurisdiction of a matter it will determine all questions of law and fact arising therein. But in common law actions, as such, the United States courts do not grant equitable relief, consequently there is no such thing recognized by them as equitable relief in actions at law.[1] At common law an equitable right is incapable of assertion in a court of law.[2] But it is there stated that: "In states in which formal distinctions between actions at law and suits in equity are abolished the court may administer relief according to the nature of the cause set out, whether it is such as would be granted in equity or given in law." What is meant by the above may be more fully understood by the following from the case of Gould v. Cayuga Co. Nat. Bank,[3] where there is a

[1] Lindsay v. Shreveport First Nat. Bank, 156 U. S. 485, and a host of cases cited in Cyclopedia of Law, Vol. 1, pp. 736, 737.

[2] *Id.*

[3] 86 N. Y. 83.

very able opinion by Mr. Justice Earle. He says: "It is idle to say that the distinction between legal and equitable actions has been wiped out by modern practice. It is true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action or defense must be truly stated; that fictions in pleading have been abolished, and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out." In the latter case it was held that an action, which was begun as a common law action did not admit of equitable relief because it was not asked and no motion had been made to convert it into an equitable action at the trial of the case in the *nisi prius* court. Had this case been tried in Texas the ruling would have been different. It is in Texas that law and equity are truly blended. In most of the other jurisdictions the distinction is marked in the manner above expressed by Mr. Justice Earle. But it is clearly demonstrated by the above that such an opinion precludes the idea that equitable relief is granted by the New York courts in common law actions. The distinction thus expressed is "as broad as a gulf," and this is true of almost all of the code states, unless there is a statute expressly allowing equitable relief in common law actions.[4]

In Illinois it is held that in a legal proceeding at common law, the court can only deal with the legal rights of the parties, and that a cause of action which might have been enforced in equity can not be set up as a defense.[5] There are circumstances which seem to admit of equitable relief only, which courts of law recognize as being proper to be set up as a defense to an action at law and yet, why the distinction should have been made does not appear, in view of the ample remedies which are permissible to reach fraud.[6]

[4] Cyc. Vol. 1, 737.

[5] Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. Rep. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511.

[6] The question of the necessity of interposing an equitable defense in an action at law would seem to depend upon the statute of the particular state wherein the action arose. In some states, unless the equitable defense is set up, which may be, the defense will be concluded by the judgment. Nicholas v. Thearon 49 Ark. 75, 4 S. W. Rep. 467; Radcliff v. Varren 56 Ga. 222; Field v. Price, 52 Ga. 469; Utah Ry. v. Crawford, 1 Idaho, 770; Winfield v. Bacon, 24 Barb. (N. Y.) 154; Foot v. Sprague, 24 How. Pr. (N. Y.) 355. But in Auburn City Bank v. Loonerd, 20 How. Pr. (N. Y.) 193, where it was held that if affirmative relief cannot be had upon an equitable defense set up by defendant in action at law, because other necessary parties are not before the court, a defendant is not compelled to obtain such relief, but may rely on the matter set up as a defense only, and may bring a separate action in equity for the affirmative relief required. Compare Elder v. Allison, 45 Ga. 13, 1 Cyc. 739. Such defenses triable upon the same principles as would apply on an original bill in equity brought for that purpose.

We will first consider a class of cases where fraud in obtaining a contract may be shown in common law actions to defeat a defense. The theory upon which the courts proceed in this class of cases is that one of the parties to a contract, having induced the other to believe he is getting something entirely different from that which he is in fact granted by the terms of the contract, then, under such circumstances, the contract could not have been nor ever was made, although the signatures of all the parties to it are appended in due form. Such a case would arise where a party would be told that the contract he was signing did not affect his legal rights because of the damage he had suffered from the injury he has received in consequence of the negligence of the other party; that the consideration given was merely to pay the expenses he must incur in being cured of the injury. Afterwards, when suit was brought for the damages so suffered, such contract would be set up as a defense and shown to be a release of all claims of the plaintiff upon the party setting it up. In such cases many jurisdictions permit the fraud so used in procuring such a release to be set up in reply, in a common law action, to defeat such fraudulent release and in such a case, when established, it is held that it is not necessary for the plaintiff to restore the consideration given for the release, on the ground that, there was in fact no such agreement in existence, so that it logically follows, no consideration could have been given for that which had no existence or ever had. Therefore, there was nothing to return on account of that character of a claim. "Nothing comes of nothing." Such was the case of C., R. I. & P. Ry. Co. v. Lewis.[7] There the plaintiff was injured in a railroad acci-

[7] 13 Ill. App. 166.

dent. The injury was permanent, causing the loss of the use of one arm of a woman who earned her living doing general housework. The railway company set up a release for the injury, signed by the plaintiff the next morning after the accident, for the consideration of $20. She replied that she was induced to sign the release upon the representation that it was merely a receipt, because of her loss on account of the delay caused by the accident. She signed it so believing. The court said: "Another point made is that appellee, if she wished to annul the contract of release, should have returned or offered to have returned the $20. But that rule of law cannot apply in a case like this where the contract was, as appellee claimed, never in fact executed. The $20, if her theory be correct, was placed in her hands in a fraudulent attempt to get a release, and under such circumstances, appellant would not be entitled to a return as a condition precedent to the right to commence the suit. In other words the rule does not govern 'in cases where a party holds out that he gives the consideration for one thing and by fraud obtains an agreement for another.'" This opinion is based upon Mullen v. The Old Colony R. R. Co.[8] and is fully recognized by the Illinois courts.[9] In allowing the deduction of the $20 from the damages, the court did not proceed strictly according to theory, because there was no consideration for the contract of release set up by defendant. The jury found there was no such contract in existence. That being so, there was no consideration to return. The $20 was obtained for an entirely different purpose than to settle the damages for which the plaintiff sued. The effect was as though a court of equity had set aside the contract and taken into consideration that the law requires the restoration of the *status quo* of the parties and had deducted the consideration for the making of the contract from the damages it had decreed. Because, having taken jurisdiction for one purpose, equity may do complete justice by settling all the questions arising out of a controversy. A court of common law has no jurisdiction for such purpose inherently. Where equitable defenses are allowed in common law actions the only logical procedure is to permit the common law court to exercise the equity in such cases, as fully as could a chancery court, and this was done in the Lewis case, *supra*, when the $20 was deducted from the damages given therein, although the reason for it is put on another ground hereafter discussed. Illinois does not recognize equitable defenses in common law actions, as heretofore shown.

Professor Eaton in his work on Equity says: "Since fraud renders a transaction voidable not void, there are several remedies available to the defrauded party: (1) He may affirm the transaction, and sue at law to recover the damages sustained by reason of the fraud. (2) He may absolutely rescind the transaction and sue at law to recover the property parted with. This action proceeds upon the theory that the transaction has already been rescinded, and therefore before the plaintiff can maintain it, he must have returned or tendered all that he received by virtue thereof. (3) He may sue in equity for a rescission, and therefore it is sufficient for the plaintiff to restore what he has received from the defendant, and the rights of the parties can be fully regulated by and protected by the judgment to be entered."[10]

Professor Eaton refers for his authority the exceedingly well considered case of Gould v. Cayuga County Nat. Bank,[11] where Mr. Justice Earle says: "The conclusion we reach leaves a defrauded party with ample remedies. One situated like the plaintiff can rescind by tendering or restoring what he has received and then commence his action. He may keep what he has received and sue to recover damages for the fraud; or he may commence an action in equity to rescind and for equitable relief, offering in his complaint to restore in case he is not entitled to retain what he has received. If he is not willing or able first to restore what he has received he is confined to one of the last two remedies." It seems to us from the foregoing that it is the sounder doctrine which holds that contracts which are obtained by fraud, are not void but voidable. The effect is as efficient in every case, for it is only the proof of fraud which makes a contract void. The remedy would be as complete by regarding it voidable even in those cases

[8] 127 Mass. 86.
[9] See Papke v. The G. H. Hammond Co., 192 Ill. 631.
[10] Eaton on Equity, p. 305.
[11] 86 N. Y. 84.

where there has been an effort to secure something entirely different from that upon which the minds of the parties had met. It is also the simpler process and leaves out a complication. The proper course in those jurisdictions when equitable defenses are not provided for in common law actions, in cases of fraud such as the Lewis case, is to hold on to the consideration and sue for damages resulting as a consequence of the fraud. The damages would be the difference between what one has received upon the fraudulent contract and what one should have received, but for the fraud—that makes a perfectly logical common law action where it is not necessary to restore the consideration as a condition precedent to the right to sue for the damages caused by the making of the frandulent contract. In such a case there is no need of bringing in an equitable defense to the plea or answer, because, the fraudulent contract is set up in the declaration, petition or complaint, and the difference between what should have been had and what was had upon the contract is set up as the measure of damages. In that way the effect of the fraud is avoided. The practical result of the conclusion of Mr. Justice Earle is, that, fraudulent contracts of any kind are voidable and not void. In such a position, the circumlocution indulged in the Lewis case, *supra*, is done away with and identically the same result reached. It would seem that the replication should bring about the same result, where fraud was charged in the obtaining of the release which is set up as a defense, as where it was charged in an original action for fraud at common law.

One of the most interesting cases upon this question, is that of Girard v. St. Louis Car Wheel Co. [12] The questions arising in such cases are ably discussed and the conclusions reached correct in the opinion of Mr. Justice Barclay. The case was one where a party gave a release for personal injuries, while he was still suffering from the injury and was not in condition to understand the purport of the release. To our mind it was just such a case as the Lewis case. That is to say it was a case belonging to that class of cases which hold that where the minds of the parties could not have met, there could have been in fact no agreement.

[12] 123 Mo. 358.

It was a case where the replication defended against an answer of release upon the ground that such release was obtained by fraud. On page 373 Mr. Justice Barclay says: "Plaintiff at the outset of the proceeding, might have set up his original cause of action and the fraud by which he was induced to execute the release for it, and on showing these facts have lawfully claimed a recovery of the difference between what he received by reason of the release and the damages justly due him upon his former cause of action. That theory would have involved acquiescence in the release which he might have given without waiving his righ to recover for the fraud in obtaining it. His right of action for fraud, upon such a showing, could be maintained without any offer to return the fruits of the release." This position is absolutely sound. He then goes on to say: "The only difference between a recovery on that basis and the judgment reached on the trial under review is one of form. The essential facts to sustain both appear in the plaintiff's pleadings and were found by the jury. Part of these facts are stated in the reply; but the only objection made at any time to the reply in the circuit court was on the ground that it admitted the existence of the release uncancelled when the action was brought. That objection we have held to be untenable for the reasons given in the first paragraph of this opinion." The reason given in effect was that, there was nothing in the release upon which the minds of the parties had met because the plaintiff was incapable of understanding that he was signing a release and this the evidence established. The dissenting opinion begs the question on this very point, and avoids the logic of Mr. Justice Barclay's opinion by assuming that the plaintiff did know the contents of the release, and bases the dissenting opinion on those cases which hold that knowing the real contents of a release a party can not afterwards rescind the contract on the ground that the subject matter was not what it was represented, and therefore a fraud, without restoring or offering to restore the consideration. But proceeding upon the theory that fraud, of whatever character, does not necessarily render a contract void, but only voidable, let us see what the result would be in a case like that under discussion. In setting

up in the replication that such a release was obtained by fraud there is an admission that there was a release it is true. But since fraud renders such a contract voidable, the very fact that fraud is set up in the replication and proven, avoids the effect of the release as a bar to the recovery, but admits that twenty dollars of the damages has been paid. In other words it is a confession and avoidance; pure and simple, and leaves exactly such an issue as would be obtained had he set up his original cause of action and the fraud by which he was induced to execute the release, which would be an action for damages for fraud at common law. There is no question but pleadings must be regarded as a whole, and who can say that identically the same effect is not reached in each method of procedure, that is to say, whether the fraud is set up in the complaint or in the replication. In each instance the fruits of the release are admitted as having been received. Why there could not be a deduction of such admission, as well in the one case as the other, is beyond comprehension. The matter of procedure is greatly simplified because both kinds of fraud could be treated in the same way—that is to say that, where the subject matter of a contract is such that the minds of the parties have been able to meet upon its details, but it afterwards turns out that there has been a fraudulent representation with regard to the quality or quantity of the consideration on the part of one of the parties then the defrauded party may hang on to the fruits and sue for the damages occasioned by the fraud, or he may proceed in equity to have the contract rescinded, or may rescind by offering to restore what has been had by virtue of the contract and sue for damages. The two latter propositions are discussed in the CENTRAL LAW JOURNAL in vol. 60, p. 384. There can be no disputing the proposition that, where there has been a release set up to an action for damages for a personal injury, and the party bringing the suit replies that such release was obtained by fraud, then such facts have been alleged as would have been required, had an action been brought at law to recover the damages for the fraud.

In the Girard case, *supra*, in the dissenting opinion of Mr. Justice Burgess, he quotes from Gould v. Bank, *supra*, which undoubtedly sustains his contention, as follows: "That case was an action brought to recover damages for the alleged breach of an agreement made by the defendants to return to the plaintiffs therein certain United States bonds loaned to the bank by him. The defense was a return of the bonds and a compromise agreement, whereby the bank agreed to pay to plaintiff, in satisfaction of his claim against it, a certain sum of money which the plaintiff accepted. To this answer the plaintiff made reply that he was induced to enter into the compromise agreement by the fraud of the defendants. No offer to return the money was made. Earle, J., in delivering the opinion of the court, said: "The compromise agreement, unless annulled, is an absolute bar to this action. It is a general rule laid down in the text-books and reported cases that a party who seeks to rescind a contract, which he has been induced to enter by fraud, must restore to the other party whatever he has obtained by virtue of the contract. * * * He cannot retain anything he received under the contract and yet proceed in disaffirmance thereof." And yet in this very same case, on page 84, he says: "One situated like the plaintiff can rescind by tendering or restoring what he has received, and then commence his action. He may keep what he has and sue for damages for the fraud, or he may commence an action in equity to rescind and for equitable relief, offering in his complaint to restore in case he is not entitled to keep what he has received. These actions are all fundamentally different. If a party is not willing or able to first restore what he has received, he is confined to one of these last two remedies." Suppose now he proposes to keep what he has and sues for damages for the fraud. Is he not compelled to show in his petition that the fraud consisted in securing a fraudulent release? Does he not set up first the subject-matter of the suit? The only difference between an action for damages for the fraud and the action where the fraud is set up in the replication, is that the fraud appears first in the replication. In the one there is set up the ground for the action, the release, and fraud in obtaining the release; in the other identically the same things, in the same order. If one can be regarded as an action for damages for fraud, why can not the other? There is nothing in the on-

to prevent a jury from arriving at the same measure of damages as in the other, and there is nothing in the way of the one being identical with the other. They are two things equal to the same thing, therefore, equal to each other. Says Mr. Justice Black: "The law is made for practical uses; it listens to no metaphysical subtleties and will not upon any terms consent to regard that as right which every sound heart feels to be wrong." It is a simple process and the irresistible logic of the premises. It prevents a lot of circumlocution which has so frequently befuddled the courts when the question has been before them. By the position we have suggested as the right one, it is nothing more nor less than a common-law action which any common-law court may allow. It does not require the return of the consideration as a condition precedent to the right to bring the suit and yet provides for the restoration of the *status quo*. It involves no question of pleading equitable defenses. It is simply a common-law action in which complete justice is provided for. The case of Girard v. St. Louis Car Wheel Co. may well be followed without fear of doing anything but to follow the simplest method in the class of cases therein considered. It violates no principle of equity. Equity would have concurrent jurisdiction of such cases, and as heretofore shown, one has his choice of these methods of procedure. Yet to distinguish and apply these three methods the courts have had and are still having a great deal of difficulty.

St. Louis, Mo. W. A. GARDNER.

CONTRACTS — FAILURE TO PAY INSTALLMENT PROVIDED IN A CONTRACT.

MICHIGAN YACHT & POWER CO. v. BUSCH.

U. S. Circuit Court of Appeals, Sixth Circuit, Mar. 16, 1906.

Defendants contracted to build for plaintiff a launch of certain speed and dimensions, to be paid for in installments as the work thereon progressed. As a part of the contract, defendants were to loan plaintiff, free of charge, another launch until the delivery of the one contracted for. Held, that the boat loaned did not stand as security for the completion of the other according to the terms of the contract, and the fact that defendants had sold her did not justify plaintiff in refusing to pay the second installment until other security was given.

A positive refusal by one for whom a launch was being built to pay an installment according to the terms of the contract, unless the builders would give him a security they were under no obligation to give, relieved them from further performance on their part.

A party to a contract which he has himself failed to carry out may under the common counts recover money paid by him in part performance to the extent that his payment was beneficial to the other party and in excess of the damages sustained by reason of the breach.

Under Comp. Laws Mich. 1897, § 10,054, which provides that the assignee of a nonnegotiable chose takes subject to every defense which existed before notice of assignment, where the assignor of a contract to build a boat is sued by the other party who has himself breached the contract, upon the common counts, in *assumpsit*, for payments made by him, the limit of such recovery is the excess of payments made over the damages sustained by reason of the breach.

Where one party to a contract sues the other party to recover payments made thereon, the latter may show that plaintiff has himself broken the agreement and prove his damages for such breach, and thus cut down or wholly extinguish the plaintiff's claim.

This was an action in assumpsit to recover money paid upon a contract for the construction of a boat to be built for the plaintiff by the defendants. The contract between the parties was in writing and bore date of December 5, 1901. The defendant companies undertook to furnish all of the materials and construct and equip and deliver in New York June 1, 1902, one launch according to plans and specifications covering dimensions, fittings, equipment, and speed. In consideration of this agreement, plaintiff agreed to pay $8,500 as follows: $2,125 in advance on signing the contract; $2,125 when the boat is planked and already for inside finish; $2,125 when ready to launch; balance when delivered in New York. It was provided, among other things, that there should be a speed trial before delivery, and that if the boat "failed to develop a speed of 16 miles per hour," or to come up otherwise to specifications, "then C. M. Busch may declare the contract void and demand a return of the money already paid." Another provision was in these words: "It is part of this contract that the Michigan Yacht & Power Company and the Sintz Gas Engine Company will loan to C. M. Busch, free of charge, the launch 'Helen,' with complete outfit, until the delivery of the boat contracted for or until the cancellation of this contract or the refunding of the cash paid thereon, as provided for above. The 'Helen' is to be delivered f. o. b. cars in Detroit to C. M. Busch and he is to pay all expenses on her thereafter until delivered in New York Harbor on the delivery of the new boat as above specified. C. M. Busch agrees to be fully responsible for the 'Helen' while in his charge and to deliver her as above specified in first class condition in New York Harbor." The plaintiff alleges that he made the advance payment required by the contract, but that the defendants have failed entirely to perform said contract and have failed to build and deliver a launch as re-

quired, though often requested to do so. Plaintiff avers that he has well and faithfully performed each and all of the obligations of the said agreement, etc. The defendants plead the general issue, and gave notice as required by the local practice of a claim of recoupment, in which they aver that they did perform the contract and stood ready and willing to perform, and that, when the boat so contracted for, "was planked and ready for inside finish," they gave notice and demanded payment of the second installment, which payment was refused wrongfully, and though many times requested to make said payment refused, whereby the defendants were greatly injured and damaged, etc. Upon the issues joined there was evidence showing the boat being constructed for the plaintiff had been so far carried forward as that it was "planked and ready for inside finish" some time in January, 1902, and that the plaintiff caused an inspection to be made upon notification and made no complaint that the condition was not such as was requisite before the second installment was due and payable. Upon being several times solicited to make payment then due, Mr. Busch advised with counsel and through his said counsel demanded that security be given him by the builders for the due performance of their contract as a condition to payment of any further installments. The ground upon which this demand was made is shown best by the letter which Mr. Busch caused to be written, which was as follows:

"Atlantic City, N. J., Feb. 20, 1902.

Michigan Yacht & Power Co., Sintz Gas Engine Co., Detroit, Michigan—Gentlemen: Mr. C. M. Busch has shown me contract of December 5, 1901, for construction of launch and also your letter to him on the 8th inst., in which you say that the yacht 'Helen' has been sold by your company to a Mr. Pungs. By the terms of the agreement the yacht 'Helen' is to be loaned to Mr. Busch free of charge until the completion of the boat contracted for, and as security for the payment made on account of the 'Helen' contract and to be made under contract of December 5, 1901. The information that the 'Helen' is not your property has caused Mr. Busch to feel insecure, both as to the money already advanced and that required to be paid by the terms of the contract of December. You will at once appreciate that Mr. Busch ought to have ample security for money he has paid you and is called upon to pay under his contract. In view of the fact that he now seems to be without security, I write you as his attorney to say that you must in some way provide indemnity against any loss, in the event of the new boat proving unsatisfactory or not, being in compliance with the contract. Even though you were the owner of the 'Helen' and Mr. Busch might regard it as his property should you fail to complete the new boat the security in the 'Helen' is quite inadequate for $6,375 which Mr. Busch is required to pay before the new boat is delivered. Please acknowledge receipt and advise what your company is willing to do under the circumstances.

Yours very truly,

C. L. Cole."

To this defendant replied under date of February 24, 1902, as follows:

"Detroit, Mich., February 24, 1902.

Mr. C. L. Cole, Atlantic City, N. J.—Dear Sir:—Replying to your favor of the 20th inst., will say that the launch 'Helen' was not furnished Mr. Busch as security in any sense of the word. Mr. Busch's is in the new boat we are now building for him. His contract is plain and a duplicate of all contracts we make for boats. Mr. Busch has no reason to feel insecure about the title of the 'Helen' because he has no interest in her whatever. Mr. Busch asked for no security when he signed the contract and we gave him none. We never had such a proposition presented to us before, although we have built a great many boats. We are under no obligation whatever to furnish Mr. Busch any further security than we are furnishing him in the boat we are building for him. We have asked for no payment on this boat until it was due and until there was more money in the boat than Mr. Busch has furnished. We ask that you please read this contract again and see if you have not made a mistake in assuming that we ever agreed to furnish Mr. Busch any other security than the boat we are building for him. Yours truly.

Dic. H. A. W.

P. S. A payment on this boat has been due since some time in January and Mr. Busch's treatment of this part of the contract has been very dilatory. He sent a representative here to examine the condition of the boat and was to remit us the payment after receiving this report. It is now a week since his representative reported and we have every reason to believe that the report was favorable."

This did not satisfy Mr. Busch, who, on advice of counsel, persisted in his refusal to make the payment due and refused pay-payment of a draft drawn for the installment due.

Thereupon the defendants wired him under date of February 27, 1902: "All work on your boat is stopped, waiting the fulfillment of your part of the contract." There was evidence tending to show that defendants kept the unfinished boat in condition when payment of second installment was refused for about one year, and then disposed of it to another purchaser at the best price obtainable at a loss exceeding the amount received from plaintiff as an advance payment.

Upon the conclusion of all the evidence the trial judge instructed the jury to return a verdict for the advance payment made by plaintiff, with interest.

Before Lurton, Severens, and Richards, Circuit Judges.

Lurton, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The case in short is this: The defendants agreed to supply materials, machinery, etc., and build and deliver by June 1, 1902, a completed launch, with a guaranteed speed of 16 miles, to be constructed according to plans and specifications. The plaintiff agreed to pay for such boat the sum of $8,500, of which $2,125 was to be paid down, the balance in installments as the work progressed. The second installment he agreed to pay when the boat was planked and ready for inside finish. When that stage of the work was reached and this second installment was due, he refused to make the payment unless the defendants would give security for their performance of the agreement or pay back the money received as the work should progress. That the Helen was never intended to stand as a security for the completion of the boat contracted for according to contract or for the return of the installments paid if she failed to develop the guaranteed speed or come up to the substantial terms of the contract otherwise is not a matter of serious doubt. There is no word in the agreement which squints that way. The Helen was to be a "loan" without rent. The consideration for her use was part of the price to be paid for the launch contracted for. If the purpose was that she was to stand as a security, it is extraordinary that no intimation of the intent is found in the long and elaborate agreement between the parties. The refusal to comply with the distinct agreement to pay an installment of $2,125 when the boat was planked and ready for inside work, unless the defendants would give a security they were not obliged to give, was in substance and effect a refusal to carry out the agreement unless the defendants would add a new term to the contract. But the learned counsel say that, if the plaintiff was in error in refusing to pay this installment unless a satisfactory security was given him, it was not conduct evidencing an intention to abandon the contract, and did not, therefore, justify defendants in their refusal to complete the boat. In short, that the breach was not such a breach as set the defendants free. It must be conceded that even in the case of a single or entire contract, such as this was, when articles are deliverable or payments to be made in installments, that the mere failure to deliver or receive an installment or to pay an installment of the price may not by itself evince an intention no longer to be bound by the contract.

In Freeth v. Burr, L. R. 9 C. P. 208, 213, Lord Coleridge said: "The real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of or an intention to abandon and altogether to refuse performance of the contract. * * * Now, nonpayment on the one hand, or nondelivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and let the other party free."

When the question is whether one party is relieved from the performance of his part of the contract by the conduct of the other in failing to make a payment when it was due, we must look to all of the circumstances of the case to see whether that conduct amounts to an out and out refusal to perform the contract. This is the substance of what is said in Withers v. Reynolds, 2 B. & Ad. 882, 885; Freeth v. Burr, cited above; Mersey Steel Co. v. Naylor, L. R. 9 App. Cases 434, 438; Norrington v. Wright, 115 U. S. 188, 210, 6 Sup. Ct. Rep. 12, 29 L. Ed. 366, and by this court in Cherry Valley Iron Works v. Florence Iron Co., 64 Fed. Rep. 569, 572, 12 C. C. A. 306, and in Monarch Cycle Co. v. Roger Wheel Co., 105 Fed. Rep. 324, 44 C. C. A. 523. Mere nonpayment of an installment when due is an element of importance, and in some circumstances may evince a renunciation of the contract. But this case, as shown by the correspondence and other evidence, was not a simple case of omission to pay as the plaintiff was bound to do, but was a positive refusal to perform the contract upon his part unless the defendants would give him a security they were under no obligation to give. That he was willing to have the contract carried out if the defendants would accede to his terms and do what they were not obliged to do does not help the case but only serves to emphasize his determination not to carry out the contract as it was written, and justified the defendants in treating the plaintiff as having renounced the agreement.

In Withers v. Reynolds, cited above, the agreement was to deliver straw at 33 shillings per load; the purchaser agreeing "to pay 33 shillings per load for each load of straw so delivered on his premises from this day until January 24th." The straw was delivered regularly, but defendant fell behind for several loads. Payment was demanded. Defendant tendered the price of all the straw except the last load, saying "he should always keep one load in hand." The defendant objected to this, but at length accepted what was offered, and then told plaintiff he would send no more straw unless it was paid for on delivery. No more was sent, and plaintiff sued in assumpsit for not delivering pursuant to agreement. Lord Tenterden said: "I am of the opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of nonpayment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is whether upon the plaintiff's saying, 'I will not pay for the goods on delivery' (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so." Withers v. Reynolds has

never been overruled. It was followed in Bloomer v. Bernstein, L. R. 9 C. P. 588, when the effect of a failure to pay for an installment of goods on delivery by reason of insolvency was considered. It was followed again in Stephenson v. Cady, 117 Mass. 6. In the latter case there were separate contracts for the sale of goods made on different days and deliverable at different times, price payable on delivery. The purchaser refused to pay for the goods delivered under the first contract unless the seller would give him security for the performance upon his part of the other contracts. The seller thereupon refused to make other deliveries, and was sued for damages. The Massachusetts court held the refusal to pay for the goods delivered unless the seller would give security for the entire fulfillment of the contract was enough to justify the seller in refusing to make further deliveries. Among other things the court said: "It was a refusal to execute a substantial part of the agreement; and an attempt, by holding on to the property without payment, to impose an onerous condition not contemplated by the original contract, and to which the defendant was not required to submit, so long as he was without default. It was something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments. It was prospective in its character, and was made with notice that such refusal would be regarded as releasing the defendant from all obligation to fulfill. Conduct less decisive has been held to justify nonperformance by the other party to the contract."

West v. Bechtel, 125 Mich. 144, 84 N. W. Rep. 69, 51 L. R. A. 791 does not refer to or distinguish either Withers v. Reynolds or Stephenson v. Cady, and must rest upon its own special facts which are quite unlike the evidence here relied upon to show that the conduct of the plaintiff was such as to evince a refusal to perform the contract upon his part. It follows that the court erred in instructing a verdict for the plaintiff. The defendants were at liberty to treat the contract as broken in a material part, and might refuse to further perform and recover damages, for the loss sustained by such renunciation of the contract by Busch. The refusal to go on and finish the boat under such circumstances would not constitute a technical rescission of the contract, but, as stated in Anvil Mining Co. v. Humble, 153 U. S. 540, 552. 14 Sup. Ct. Rep. 876, 38 L. Ed. 814, by Justice Brewer, would be "merely an acceptance of the situation which the wrongdoing of the other party has brought about." To same effect is our own case of Cherry Valley Co. v. Florence Iron Co., 64 Fed. Rep. 569, 573, 12 C. C. A. 306. While the plaintiff cannot recover upon the contract, he may under the common counts recover the money paid by him in part performance to the extent that his payment was beneficial to the defendants and in excess of the damages they have sustained by reason of plaintiff having breached the contract. If the defendants have obtained money which *ex æquo et bono* they ought not to withhold from the plaintiff, they should refund, and the law implies a promise to that effect. Murphy v. Craig, 76 Mich. 155, 42 N. W. Rep. 1097; Walker v. Conant, 65 Mich. 194, 31 N. W. Rep. 786; Wilson v. Wagar, 26 Mich. 452. If the defendants had sued the plaintiff for breach of the contract, as they might well have done, the measure of damages would have been, first, their outlay and expense in carrying the work as far as they did before the plaintiff set them free, less the value of the structure as far as completed and materials, machinery, etc., bought solely to carry out this contract; second, the profits they would have realized if permitted to complete the boat; third, the value of the use of the Helen while in possession of the plaintiff under the contract. From this should be deducted the money received from the plaintiff on account of the contract. United States v. Behan, 110 U. S. 339, 4 Sup. Ct. Rep. 81, 28 L. Ed. 168; Anvil Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. Rep. 876, 38 L. Ed. 814; McElwee v. Bridgeport Improvement Co., 54 Fed. Rep. 627, 629, 4 C. C. A. 525. The defendants did not sue, but have been sued by the plaintiff for the money paid by him in part performance. In justice the defendants have no right to more of this money than will compensate them against loss by reason of plaintiff's conduct. His action is therefore one upon the common counts for money received under an implied promise to pay back that which is in excess of the loss sustained by the defendants by reason of plaintiff's refusal to carry out the contract. It is in the nature of an action upon a *quantum meruit*.

Instead of having done labor or furnished materials in part performance from which the defendants have benefited, he has furnished money, and it is now well established that a plaintiff may recover to the extent that he has benefited the defendant by part performance of a contract which the plaintiff himself has failed to carry out; his recovery being subject to recoupment by the damages sustained by the defendant. Cherry Valley Iron Co. v. Florence Iron River Co., 64 Fed. Rep. 569, 574, 12 C. C. A. 306; McDonough v. Evans Marble Co., 112 Fed. Rep. 634, 637, 50 C. C. A. 403; Clark v. Moore, 3 Mich. 55, 58; Wilson v. Wagar, 26 Mich. 452; Ward v. Fellers, 3 Mich. 281.

In Cherry Valley Iron Co. v. Florence Iron Co., the plaintiff had himself broken a contract for the purchase of a large quantity of iron ore. But he had paid for more ore than he had received. This court, speaking by Judge Severens, sustained an action by him to recover the money he had paid in excess of ore delivered to him. Upon this point the court said: "The position of the parties, therefore, is this: The plaintiff is entitled to recover the amount which it has paid in excess of the contract price of the quantity of ore actually delivered, and the defendant was en-

titled to recover, by way of counterclaim, the damages which it had sustained from the plaintiff's breach of contract," etc.

In McDonough v. Evans Marble Co., cited above, we said: "The rule is that a party who has failed to perform his contract in full may recover compensation for the part performed, less the damages occasioned by his failure."

There was evidence tending to show that the Sintz Engine Company, one of the defendants, had substantially absorbed and acquired the property of the other defendant, the Michigan Yacht Company, when the contract involved was made, but that the contract was signed by both companies. There was also evidence that long after the breach of the contract in suit, and long after the defendants had disposed of the unfinished launch to another customer at a great loss, the Sintz Engine Company made a chattel mortgage to Mr. Wm. A. Pungs, and that the property described in that instrument was sold in a foreclosure proceeding on October 1, 1904, and bought by Pungs. Among the matters so sold and purchased were the "book accounts and bills receivable owing to said Sintz Engine Company." Upon this state of facts the plaintiff below insisted that the money paid by the plaintiff in part performance could not be diminished or affected by any damages or loss sustained by the defendants, because, as claimed, they "had parted with all their claims, accounts and property of every description," and "could not recoup damages in this action from this plaintiff." If we assume that the right of action which defendants had to sue for the loss sustained by them by reason of the plaintiff's breach of his contract passed to Pungs under an assignment which included "book accounts and bills receivable," it is clear that such a chose in action would pass subject to a credit for the $2,125 received by defendants on account of plaintiff's part performance. To that extent the defendants may be said to have been already indemnified. Section 10,034, Comp. Laws of Michigan 1897, expressly provides if that were ever necessary that the assignee of a nonnegotiable chose takes subject to every defense which existed before notice of assignment. Or, if the effect of the assignment under which Pungs holds the assets of the Sintz Engine Company was to pass the contract for the construction of this boat for plaintiff, the assignee would take it subject to every defense which the plaintiff could have made if the assignor had sued for a breach. One of these defenses would be to recoup any recovery for a breach by the amount paid in performance. 3 Page on Contracts, § 1269; 25 Am. & Eng. Ency. (2d Ed.) 529. This being the case, it must follow that if the assignor of a contract, not negotiable, be sued, as here, upon the common counts, in assumpsit, for benefits received by him, that the limit of such recovery must be, where the plaintiff himself breached the contract, the excess of benefit received over the damage sustained by reason of the plaintiff's nonfulfillment of the agreement. This reduction of the amount otherwise recoverable is by way of recoupment. That it exists in favor of the defendants here we have no doubt, regardless of any assignment of the contract out of which plaintiff's right of action grows. The assignors cannot escape liability for the amount equitably due to the plaintiff by the assignment, nor can the plaintiff prevent a reduction of his nominal claim by application of the doctrine of recoupment as distinguished from setoff. Recoupment in its truest sense means a right of deduction from the amount of the plaintiff's claim by reason of either a payment thereon or some loss sustained by the defendant by reason of the plaintiff's wrongful or defective performance of the contract out of which his claim originated. It has been defined to be "a keeping back of something which is due because there is an equitable reason for withholding it." Ives v. Van Epps, 22 Wend. (N. Y.) 155; Ward v. Fellers, 3 Mich. 281, 291; Wheat v. Dotson, 12 Ark. 699, 702. The word is nearly if not quite synonymous with discount or deduction or reduction. 2 Parsons on Contracts (7th Ed.), 880; Hatchett v. Gibson, 13 Ala. 587, 595. It is accordingly well settled that, when one party brings suit to recover under a contract or upon the common counts for work and labor done or money paid to or for his benefit, the defendant may show that the plaintiff has himself broken the agreement and prove his damages for such breach, and thus cut down or wholly extinguish the plaintiff's claim. 25 Am. & Eng. Ency. Law, 549; Railroad Company v. Smith, 21 Wall. 258, 262, 22 L. Ed. 513; Allen v. McKibbin, 5 Mich. 449; Cushman Telephone Co. v. Noble, 98 Mich. 67, 56 N. W. Rep. 1100; Porter v. Woods, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153. In the case last cited the Tennessee court said: "After the rescission and abandonment of a special agreement compensation for partial performance may be recovered, equal to, and limited by, the value and extent of the benefit conferred. And therefore the defendant in such action, in the second place, is entitled, by the very statement of the principle with its proper limitation, to abate the recovery of the plaintiff by the damages he has sustained on account of the nonperformance of the plaintiff's portion of the agreement. For the plaintiff himself being entitled to recover, not on the ground of his performance of the special agreement, but for valuable materials furnished, or beneficial services rendered, and only to the extent of benefit conferred on the defendant, the defendant must be entitled in abatement, and in ascertaining the extent of such benefit, to such damages as in a cross-action by him against the plaintiff he ought to recover for the nonperformance by the other of his portion of the agreement."

The court therefore erred in excluding evidence of the damages sustained by the defendants through the plaintiff's breach of the contract out of which the plaintiff's claim arose.

Reverse for a new trial.

NOTE.—*Damages Resulting in Cases where there has been a Contract to Pay upon Delivery of Installments of the Thing Contracted for, and a Refusal to Pay for an Installment as Agreed.* — The principal case is an excellent example of this class of cases, and shows some interesting features growing out of an evident failure on the part of the plaintiff to appreciate the nature of the contract in question and the natural effect of his own failure and refusal to perform it. There was an attempt to ring into the contract something which plainly was never in the contemplation of the parties at any time. The court said "that the Helen was never intended to stand as security for the completion of the boat contracted for, according to contract, or for the return of the installments paid if she failed to develop the guaranteed speed or come up to the substantial terms of the contract otherwise, is not a matter of serious doubt. There is no word in the agreement which squints that way. The Helen was to be a 'loan' without rent." As is shown in the principal case the boat contracted for was to be paid for in installments, and when the plaintiff refused to pay for one of the installments when it became due, on the ground that the Helen was to be a security for the faithful performance of the contract, there was a total abandonment of the contract on the plaintiff's part. This breach not only absolved the defendants from further performance on their part, but gave them the right to recover the profits which might have been made by faithful performance on the plaintiff's part. There is no question in this case of an attempt on the part of the defendants to complete the contract after the notification on the part of the plaintiff that he did not intend to be bound by the terms of the contract, in which event the rule of damages which holds that after a repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based upon full performance, for a party cannot hold a defendant liable for damages which need not have been incurred. Wald's Pollock on Contracts, Williston's Ed. 349, and cases cited, among which, Hosmer v. Wilson, is a very instructive case. The plaintiff was seeking by the contract to obtain a boat of certain description, the defendant's, the profits which should result from faithful performance. The defendants, by regarding the contract as repudiated by the plaintiffs, when the contract was only partially performed, could not then go on and complete the contract and charge up the full cost of it against the plaintiff if the damages could have been mitigated by stopping at the time the contract was regarded as rescinded because of the plaintiff's wrongful act.

A good illustration is that of Robling's Sons v. Lockstitch Fence Co., 130 Ill. 660: "The defendant, resident in Illinois, contracted to buy of the plaintiff, resident in New Jersey, 500 tons of barbed wire. After 120 tons had been delivered the defendant requested the plaintiffs to stop shipping, and on refusal of the latter telegraphed 'will not take wire if shipped.' Nevertheless the plaintiff went through the futile and expensive steps of preparing and shipping the wire, and was held entitled to recover damages for so doing." Wald's Pollock on Contracts, p. 350. The case of the Lake Shore & Mich. So. Ry. Co. v. Richards is put in the same class as the Lockstitch Fence Co. case, *supra*, but this is certainly from a wrongful conception of the basis of the measure of damages in that case, The basis of the measure of damages in the Lake Shore case, *supra*, was the actual profits which the plaintiff was shown to have been entitled to by a faithful performance, after all expenses were paid, and infringed no rule of the American courts, and was based particularly on the case of Masterson v. Brooklyn, 7 Hill, 61, and Richmond v. D. & S. C. Ry. Co., 40 Iowa, 264, which are conceded to have stated the rule properly under the circumstances. These cases are well worth the careful consideration of every lawyer.

But the principal case involves properly the right of both parties to be placed *in statu quo*. When a party chooses to rescind a contract, as in this case, he recognizes the right of the other party to be put *in statu quo* and expects to be placed in as good a position himself as he was before there had been any part of the contract performed. Before a party may rescind the acts of the other party must have amounted to a rescission of the contract, if one party could by himself rescind. Therefore, when a party has a right to rescind and proceeds to rescind, it is because he recognizes the act of the other party as amounting to a rescission of the contract. Having so accepted the wrongful acts of the other party the law recognizes the injured party's right to be placed *in statu quo*, subject to the other party's right to be so placed, *i. e.*, *in statu quo*. Coolidge v. Bingham, 1 Metc. 547; Tyson v. Doe, 15 Vt. 571. And either party may force the other to so place him. In the principal case the contract was wiped out of existence by the acceptance on the part of the defendant of the acts of the plaintiff as amounting to a rescission. While the plaintiff had no right to an action to recover anything more than that which would have placed him *in statu quo*, the defendant might have proceeded to recover full compensation as for a total abandonment of the contract on the plaintiff's part had not the trial court excluded the evidence of it.

The circuit court of appeals was right in its conclusion that "it must follow that if the assignor of a contract not negotiable, be sued, as here, upon the common counts, in assumpsit, for benefits received by him, that the limit of such recovery must be, where the plaintiff himself has breached the contract, the excess of benefit over the damages sustained by reason of the plaintiff's non-fulfillment of the contract. This reduction of the amount otherwise recoverable is by way of recoupment. That it exists in favor of the defendant here we have no doubt, regardless of any assignment of the contract out of which the plaintiff's right of action grows. The assignors cannot escape liability for the amount equitably due the plaintiff by the assignment, nor can the plaintiff prevent a reduction of his nominal claim by application of the doctrine of recoupment as distinguished from set-off." The doctrine of recoupment does not seem to have obtained general recognition, but its application in a matter, such as is shown by the principal case, must strike the reader as both sensible and logical and saves circumlocution.

The facts in the case of Withers v. Reynolds, 2 B & Ad. 882, 885, develop identically the same principles involved in the principal case. The refusal to pay for the straw upon delivery as agreed, was a refusal to perform the contract agreed upon and the attempt to substitute something upon which the minds of the parties to the contract had never met, and refusal to perform except upon the substituted demands was correctly regarded as a total failure which, had it been necessary, would have given the right to recover damages as for a total failure. In the case of Franklin v. Miller, 4 Adol. & El. 606, Mr. Justice Coleridge said: "In Withers v. Reynolds each load of straw was to be paid for upon delivery. When the plaintiff said

he would not pay for the loads upon delivery there was a total failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract." Of course in such a case there is the right to recover all the damages resulting from non-performance. In the principal case the rule is aptly stated, citing United States v. Behan, 110 U. S. 339; Anvil Mining Co. v. Humble, 153 U. S. 540; McElwee v. Bridgport Improvement Co., 54 Fed. Rep. 627, 629, 4 C. C. A. 525.

W. A. G.

JETSAM AND FLOTSAM.

WHY HE REFUSED A FEE.

A most unusual fact occurred in the Clay County (Mo.), Circuit Court during its recent session. It was in the case of the attorney general at the relation of Allen B. Jones, James Love, Alexander B. Crawford, Abram T. Litchfield and Trigg T. Allen against Clay County as trustee of the Aull School Fund and others. The object of that case was the re-adjustment and administration of that fund with reference to the changes in conditions caused by this state's adoption of the system of free, public education, supported by taxation. The Aull Fund, a charity established by John Aull in his will, made in 1838 (he died in 1842), was "to pay the tuition or education of orphan or poor children under the age of 16 years, at or within two miles of the county seat of Clay county." After the institution of the suit, on their own motion the judges of our county court and Messrs. H. F. Simrall, Sydney G. Sandusky and Enoch H. Miller, directors of the Liberty public school district, were made defendants. Throughout, D. C. Allen represented the attorney general and the relators, Mr. Jones and others, and Judge Sandusky and Hon. Frank H. Trimble represented the county judges and the school district. The theory of the petition or information, in the case of the attorney general was, that only the orphans or poor children meant by the will—the class of persons—could by law share in the benefits of the fund, and because of the changes in conditions since Missouri adopted free public education, supported by taxation, the age of the orphans or poor children, meant by the will, should be raised, and the income of the fund, as far as it would extend, applied exclusively to their education in universities or high colleges, after completion of the courses in the Liberty public schools. For some years the county court had been making appropriations out of the fund, amounting to $8,000, to the Liberty school district.

On trial in our circuit court, it decided against the theory of the petition or information, and by its decree—it is unnecessary to go into details—permitted the county court to continue appropriations out of the fund to the Liberty school district. From this decree, the attorney general appealed to the Missouri Supreme Court. That court (Division 2), by its decision last March, affirmed the decree of the circuit court. The unusual fact alluded to, came out of the motion by Mr. Trimble, during the recent term of our circuit court, for the allowance out of the Aull Fund of the fees of the attorneys. The court allowed Judge Sandusky $250; Mr. Trimble $250; and Mr. Allen $250; but Mr. Allen at once refused to accept the allowance made him. In refusing to accept the allowance to him, Mr. Allen said in brief: "Candor, courteously expressed, is the highest respect to a court. He would be candid. He would not deny that he had made a most extensive examination of the facts of law and history bearing on the case. As a fact of the intellect, it was impossible for him to believe that the conclusion of our supreme court in the case was in harmony with the law. On the contrary, he believed the principle established by the supreme court is dangerous—converts the Aull Fund from a charity for orphans and poor children into a part of the public school fund—and is against the overwhelming weight of authority. He was strongly inclined to think the case involved a federal question, and, if so, it could be taken to the United States Supreme Court. He would carefully examine this matter and if there is a federal question and the needed funds to do so can be raised, the case would be taken to the United States Supreme Court. If this be done, it would manifestly be improper for him to appear there after taking a fee from the fund in the state court." The suit, moreover, had been brought on his investigation and opinion. The attorney general and the relators have relied on him. He could not, therefore, take a fee from the Aull Fund until he could bring victory to it. He was built that way and such was his feeling.

Mr. Allen said, also, that, in addition to his duty as a citizen and lawyer, he was impelled to his course by a sentiment—a family tradition. His father, the late Col. Shubael Allen, and John Aull were young men together in Old Franklin, Howard County, Missouri, in 1818, and remained there until in 1820, when the former came to Clay County and the latter went to Lexington, Mo. During the remainder of their lives, above 20 years, they were warm personal friends, and John Aull, during that period, had often partaken of his (Mr. Allen's), father's hospitality at Upper Liberty Larding in Clay County. Besides, his brother, the relator Trigg T. Allen (who died la t winter a year ago), felt a very warm interest in the case. For years the deceased had declared it to be wrong for the county court to make appropriations out of the Aull Fund to the school district. The fund belonged, as he thought, to the orphans and poor children. His brother's opinion and wish was, Mr. Allen said, a kind of legacy to himself, and had his brother lived there would have been no lack of funds to prosecute the case to the supreme court, if it may be done.

BOOK REVIEWS.

FOIBLES OF THE BENCH.

Foibles of the Bench, by Henry Wilcox of the Chicago bar, is a work which gathers the emanations of the weaknesses of human nature, lifted out of normal settings. These weaknesses are exaggerated when exposed to public view; human vanity in a place where it may show off without seeming to. "All the world is a stage and all the men and women in it merely players." Many are naturally generous, courteous, accommodating, brave and true. Many others think they possess these qualities because they desire to impress others that they have them. A man may write beautifully of equity, courtesy, justice, wisdom and truth, and yet be selfish, unjust, absolutely dishonest, and a veritable hog in his treatment of his associates. The fact that a judge ought to be possessed with qualities which would make him a fit associate of the angels does not often lift him to so great a height, and yet there has been a tendency to ascribe such lofty attributes to a

judge because of the fact that he has become one. It is not to be wondered at, if human nature forgets that its place is not lower than that of the angels, and assumes the apparel and demands the worship, while every one knows that there is but a man after all, with his imperfections aglow in the lime light in which the office is situate, and where his own foibles become exaggerated. Man frequently wishes to seem what in his heart he knows he is not. Emerson says: "Every one alone is honest, hypocricy begins at the entrance of a second person." Says the author of this work: "A common error is the supposition that a judge is called upon to discharge the functions of Deity." While this is to a considerable extent true, there are a lot of us who know that he is the result of political favoritism and that there are many of his associates, as a rule, far better fitted for the office than he, in every respect. His fitness for the position is not tested by the methods which show forth his qualifications. The author goes on to say: "The judge is neither the creator nor preserver of things human or divine. His business is to judge, to decide, to compare and determine relative to existing things. The same function is exercised by the person who identifies a calf, a section corner, a counterfeit bill, a piece of ore, or anything about which a dispute has arisen. The fact that a judge should separate the true from the false and declare the law does not change the characterof his task. The parties furnish the proof of what they claim the truth to be. He picks out the truth. They furnish the evidence of what they claim the law to be. He picks out the law. He acts according to rules made for him. If he weighs the evidence he acts as a scales. In measuring he is a yardstick. He must not add anything to the weight or quantity. His mind should be so free from prejudice that it will respond readily, like a well-oiled balance. His yardstick must always be of the same length. The justice which he administers does not emanate from him. It is legal justice, the law has already determined it. * * * Any self-interest or other bias tending to incline his mind in favor of one party or the other unfits him for his task. It falsifies his judgment. If he mistakes his calling for that of a lawmaker, or substitutes his own conscience for the mandates of the law, or the proofs of facts, he is a false balance, an elastic yardstick, a cheating device.

Our government is divided into three branches, legislative, executive and judicial. The first makes the laws, the second declares them and the third enforces them. The splendid superstructures of our liberties is supported by these three pillars. The proper balance can only be maintained by each department attending strictly to its own business. When a judge attempts to pass upon the justice of the law and modify it to suit his own notions, the legislature is put out of business. If he concludes that a law is unjust and should not be enforced, and so refuses to enter the judgment which the facts warrant, out of mercy for the culprit, the executive department is deprived of its function. All question as to what the law ought to be belongs to the legislature. All relative to the execution of the sentence should be left to the executive department. The conscience of the judge should find satisfaction in the discharge of his judicial duties according to the law." All the above should seem self-evident, and yet when Mr. Justice Brown, retired from the United States Supreme Bench, he advised judges to follow the law as they find it, and if it ought to be changed, to leave the question to the legislature. The book is interesting and ought to be read by the profession generally. The author entertainingly describes a Judge Knowall, Judge Doall, Judge Wasp, Judge Fearful, Judge Wabbler, Judge Graft, Judge Whiffit, Judge Windi and makes other references to types of judges, which are really types of human nature, which he says, "have existed from the beginning of history." This little work points out the existing evils in an entertaining manner and ought to do much good.

Published in one small volume by the Legal Literature Co. of Chicago, Illinois.

CENTRALIZATION AND THE LAW.

This work is a compilation of lectures with an interesting introduction by Hon. Melville M. Bigelow, dean of the Boston University Law School. The introduction by Mr. Bigelow is on the subject "The Extension of Legal Education." The first lecture is entitled "Nature of Law-Methods and Aim of Legal Education," by Mr. Brooks Adams (43 pages); the second lecture is entitled "Law Under Inequality Monopoly," by Mr. Brooks Adams (72 pages); the third lecture, "Law Under Equality or Inequality Defined," by Melville M. Bigelow (30 pages); the fourth lecture, "Scientific Method in Law," by Melville M. Bigelow (43 pages); the fifth lecture, "Law as an Applied Science," by Edward A. Harriman (23 pages); and the sixth lecture, "An Object Lesson in Extension: Rate-Making," by Henry S. Haines (38 pages). The lectures make very interesting reading for the lawyer and takes him, as it were, from the valley to the mountain top, where he may obtain a general view of the trend of the science of which he is so important a factor.

Printed in one 12 mo. volume and published by Little, Brown & Co., Boston, Mass.

BOOKS RECEIVED.

A Hand-book of Corporation Law, as Applied to Private Business Corporations. By Richard Selden Harvey, of the New York Bar. New York. The Bleyer Law Publishing Company. 1906. Buckram, pp. 588. Price $6.00. Review will follow.

HUMOR OF THE LAW.

In Florida, after the land and timber litigation between those two new and rapidly increasing classes known as "turpentiners" and "phosphaters," and the older squatter population, or "natives," there is no richer single source of fees and business to young attorneys than the easy cattle-thieving in this sparsely settled, free-range state. When the round-ups come, it is so hard not to bring in other calves besides your own for the branding.

Crimination and recrimination, therefore, between cattlemen is an every-day matter here, forming a regular item in the lawyer's forecasted revenues.

For this reason it strikes many of our profession with a sense of actual loss to read, in a late issue of a prominent Florida journal, that at the recent convention of the Cattlemen's Association, some man with an aptitude for calling a spade a spade, arose and proposed the following unique resolution:

Resolved, that we quit stealing one another's cows. To the credit of the association—though the discomfiture of the legal profession in these parts—it is added that the resolution was adopted by an overwhelming majority, and in absolutely sound faith!

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Power of Lower Court to Disregard Appeal.—Where an order dismissing an action on plaintiff's motion was not appealable, the court, on the trial of a subsequent action involving the same matter, properly disregarded a pending appeal from the order.—Deere & Webber Co. v. Hinckley, S. Dak., 106 N. W. Rep. 188.

2. ACCORD AND SATISFACTION—Unexecuted Accord.—A promise to pay an insurance loss as originally proved held a mere executory accord not amounting to a satisfaction.—Manley v. Vermont Mut. Fire Ins. Co., Vt., 62 Atl. Rep. 1020.

3. ACTION—Stay of Proceedings.—An order staying trial of an action by defendant against plaintiff, brought in the municipal court, pending the trial of an action in the supreme court by plaintiff against defendant, arising out of the same transaction, held not a proper exercise of discretion.—Walkup v Mesick, 97 N. Y. Supp. 142.

4 ANIMALS—Liability of Owner for Trespass.—Owner of cattle who intrusts the possession and control of the cattle to another held not liable for the acts of the latter in turning the cattle onto certain land.—Mott v. Scott, Colo., 83 Pac. Rep. 779.

5. ANIMALS—Trespass by Bees.—The liability of the owner of bees for an injury done by them to the property of another rests on the doctrine of negligence.—Petey Mfg. Co. v. Dryden, Del., 62 Atl. Rep. 1056.

6. APPEAL AND ERROR—Cessation of Controversy.—The supreme court will not dismiss a case because of a cessation of the controversy between the parties, unless such cessation is clearly shown to exist.—State v. Superior Court of Lincoln County, Wash., 83 Pac. Rep. 726.

7. APPEAL AND ERROR—Demurrer.—There is no error in sustaining a demurrer to a paragraph of an answer where all the evidence admissible under it was admissible under the general denial.—City of Valparaiso v. Spaeth, Ind., 76 N. E. Rep. 514.

8. APPEAL AND ERROR—Final Judgment.—A refusal to render judgment by default against one of several defendants for want of an answer was not a final judgment from which an appeal would lie.—Carpenter v. Ingram, Ark., 91 S. W. Rep. 24.

10. APPEAL AND ERROR—New Trial.—Where the court on motion grants a new trial, and defendant excepts, he may either appeal at once, or after second trial, if the judgment is adverse, appeal from the final judgment, and include an assignment that the court erred in granting the first new trial.—Linderman v. Nolan, Okla., 83 Pac. Rep. 796.

11. APPEAL AND ERROR—Nonsuit.—There was no error in denying a nonsuit on a count of the complaint where plaintiff disclaimed reliance thereon and no instructions were given thereon.—Flinn v. Crooks, Cal., 83 Pac. Rep. 812.

12. APPEAL AND ERROR—Review.—On appeal the appellate court will not pass upon the correctness of a particular instruction to which no error is assigned, for the purpose of guiding the court below in the event of a retrial.—Troxell v. Anderson Coal Min. Co., Pa., 62 Atl. Rep. 1083

13. APPEAL AND ERROR—Sufficiency of Exceptions.—Exceptions to instructions must be taken severally, and where instructions are excepted to as a whole, the exception will not be available unless all the instructions are erroneous.—Baltimore & O. S. W. R. Co. v. Kleespies, Ind., 76 N. E. Rep. 1015.

14. APPEAL AND ERROR—Sufficiency of Transcript.—A clerk's certificate to a transcript held to authenticate one or both of the paragraphs of the complaint, enabling the court on appeal to determine the sufficiency of the evidence to uphold the verdict.—Chicago, I. & L. Ry. Co. v. Reyman, Ind., 76 N. E. Rep. 970.

15. APPEARANCE—Effect Where Sued Outside of District of Residence.—The right of a defendant in a federal court to be sued in the district of his residence is one which he may waive, and which is waived by a general appearance.—Mahr v. Union Pac. R. Co., U. S. C. C., E. D. Wash., 140 Fed. Rep. 921.

16. ARSON—Evidence.—In a prosecution for arson alleged to have been committed with intent to secure insurance money, admissions made by defendant to an insurance adjuster that he had had fires in other buildings than the one in question were inadmissible.—People v. Brown, 96 N. Y. Supp. 957.

17. ATTACHMENT—Damages for Wrongful Attachment.—A shipper bidding in horses wrongfully attached during transportation held entitled to recover only the amount of the bid.—Wallingford v. Kaiser, 96 N. Y. Supp. 981.

18. ATTACHMENT—Proceedings in Federal Court.—An attachment issued by a federal circuit court held to have the effect of bringing property of the defendant corporation within the constructive custody of the court.—Beardslee v. Ingraham, N. Y., 76 N. E. Rep. 476.

19. BANKRUPTCY—Corporations Engaged in Manufacturing.—A corporation engaged in the business of building bridges, wharves, bulkheads, and driving piles, under contract, which has no plant where it manufactures bridges for the market, but does all of its work on the ground after contracting therefor, is not engaged in manufacturing within the meaning of Bankr. Act, 1898, and is not subject to be adjudged an involuntary bankrupt thereunder.—Butt v. C. F. MacNichol Const. Co., U. S. C. C. of App., Fourth Circuit, 140 Fed. Rep. 840.

20. BANKRUPTCY—Debts Not Discharged.—A creditor, receiving a dividend in his debtor's bankruptcy proceedings, held not prohibited under the statute to sue for the balance of his claim, created by the debtor's fraud.—Katzenstein v. Reid, Murdock & Co., Tex., 91 S. W. Rep. 360.

21. BANKRUPTCY—Effect of Discharge on Liability for Torts.—Under Bankr. Act, ch. 541, § 17, a bankrupt's discharge held not to relieve him from a judgment for damages for assault, false imprisonment, and malicious prosecution, though the acts which were the foundation of such judgment were not malevolent in fact.—McChristal v. Clisbee, Mass., 76 N. E. Rep. 511.

22. BANKRUPTCY—Nature of Proceedings.—The ordinary proceedings taken in administering a bankrupt estate are not proceedings *in rem* which bind persons not parties thereto.—Whitney v. Wenman, U. S. D. C., S. D. N. Y., 140 Fed. Rep. 959.

23. BANKRUPTCY—Order Allowing Expenses of Mas

ter.—An order allowing expenses of a trustee for counsel fees is an administrative order, not appealable as one allowing a "debt or claim" against the estate, under Bankr. Act, 1898, but reviewable only by petition to superintend and revise under section 24b.—W. J. Davidson & Co. v. Friedman, U. S. C. C. of App., Sixth Circuit, 140 Fed. Rep 853.

24. BANKRUPTCY—Ordering Bankrupt to Surrender Property.—To justify an order requiring a bankrupt to turn over money or property under penalty of imprisonment for contempt, the court must be satisfied beyond a reasonable doubt that he has such money or property in his possession or under his control.—*In re* Switzer, U. S. D. C , D. S. Car., 140 Fed. Rep. 976.

25. BANKRUPTCY—Partnership.—A court of bankruptcy which is administering the estate of a bankrupt partnership has jurisdiction, as incidental thereto, to take possession of the property of a partner, although he has not been and could not be adjudged a bankrupt individually, and to administer the same so far as necessary to a settlement of the partnership estate.—Dickas v. Barnes, U. S. C. C. of App., Sixth Circuit, 140 Fed. Rep. 849.

26. BANKRUPTCY—Preferential Mortgage to Creditor.—A mortgage given by a bankrupt to a creditor within four months prior to the bankruptcy with intent to prefer such creditor is a conveyance or incumbrance made with intent to hinder, delay, or defraud his creditors, and void as against his trustee.—*In re* Hill, U. S. D. C., N. D. Cal., 140 Fed. Rep. 984.

27. BANKRUPTCY—Voidable Preferences.—Mortgages given by a bankrupt to secure an antecedent debt, within four months prior to his bankruptcy, held voidable by his trustee on the ground that he was insolvent at the time, and the mortgagee's agent had reasonable cause to believe that such was the fact.—*In re* Nassau, U. S. D. C., E. D. Pa., 140 Fed. Rep. 912.

28. BENEFIT SOCIETIES—Misrepresentations in Answer.—The rule estopping an insurer in specified cases from asserting the falsity of answers in an application for insurance held to apply to mutual benefit societies.—Lyon v. United Moderns, Cal., 88 Pac. Rep. 804.

29. BILLS AND NOTES—Payable at Maker's Death.—Notes payable at maker's death and left with her attorney to be delivered to respective payees held claims against the makers' estate.—*In re* Simmons' Estate, 96 N. Y. Supp. 1103.

30. BOUNDARIES—Calls and Courses.—Where, in a grant by the state of lands, more objects are embraced in a call than are possible, that course must be run which includes a majority of them.—Kerr v. De Laney, Ky., 91 S. W. Rep. 286.

31. BUILDING AND LOAN ASSOCIATIONS—Sale of Stock.—Continued possession of stock in building and loan association by a shareholder after selling the same to the association held, under the circumstances, not inconsistent with such sale.—Rogers v. Ogden Bldg. & Sav. Ass'n, Utah, 83 Pac. Rep. 754.

32. CARRIERS—Damage to Fruit.—Under a contract of shipment of fruit, the shipper's failure to supply sufficient ice held presumptively the cause of the injury to the fruit, in the absence of evidence of a default on the carrier's part.—Chicago, I. & L. Ry. Co. v. Reyman, Ind., 76 N. E. Rep. 970.

33. CARRIERS—Delay in Delivery of Trunk.—Where an express company failed to deliver plaintiff's trunk on demand, but offered to deliver after the trunk had been found, it was only liable for the damages occasioned by delay in delivery.—Wells, Fargo & Co. v. Hanson, Tex., 91 S. W. Rep. 321.

34. CARRIERS—Presumption as to Negligence.—In the absence of any explanation of the cause of the derailment of a train, the law presumes, in an action for injuries to a passenger, that it was caused by the negligence of the carrier.—Galveston, H. & S. A. Ry. Co. v. Green, Tex., 91 S. W. Rep. 380.

35. CERTIORARI—Petition.—A petition for certiorari will be dismissed, it not showing the agreement on which the jurisdiction of the trial court obviously depended.—Stevenson v. McDonald, Ark., 91 S. W. Rep. 300.

36. CHATTEL MORTGAGES—After Acquired Merchandise.—A chattel mortgage covering after acquired merchandise purchased by the mortgagor, to replace stock sold as permitted by the terms of the mortgage held valid under the law of New York.—*In re* Burnham, U. S. D. C., N. D. N. Y., 140 Fed. Rep. 926.

37. CHATTEL MORTGAGES—Priorities.—Where a mortgagee permits the mortgagor of chattels to retain them, authority is conferred on the mortgagor to have necessary repairs made, and the lien of an artificer for such repairs will have priority over the lien of the mortgage, though recorded.—Ruppert v. Zang, N. J., 62 Atl. Rep. 998.

38. CONSTITUTIONAL LAW—Exercise of Power of Eminent Domain.—Proceedings for the condemnation of property by a city for public use are not invalid, as taking property without due process of law, because under the statute the assessment of damages is made by a commission appointed by the mayor to have charge of the making of the contemplated public improvements, nor because in case of appeal from the award of damages the judge is given discretionary power in regard to the taxing of costs.—Dyer v. City of Baltimore, U. S. C. C., D. Md., 140 Fed. Rep. 880.

39. CONSTITUTIONAL LAW—Game Laws.—Laws 1900, p. 22, ch. 20, prohibiting the possession of game coming from without the state during the close season, is not unconstitutional as depriving a person of property without due process of law.—People v. Hesterberg, N. Y., 76 N. E. Rep. 1032.

40. CONSTITUTIONAL LAW—Immunity as to Self-Incrimination Personal to Witness.—Privilege against self-incrimination, afforded by Const. U. S. Amend. 5, is purely personal to the witness.—Hale v. Henkel, U. S. S. C., 26 Sup. Ct. Rep. 370

41. CONSTITUTIONAL LAW—Impairing Obligation of Contracts.—Acts Md. 1904, pp. 179, 597, ch. 101, 337, which attempt retroactively to substitute a single suit in equity in a Maryland court for the benefit of all creditors to enforce the liability of stockholders in a corporation for the creditor's right of action against an individual stockholder, given by Acts 1892, p. 153, ch. 109, is unconstitutional and void as impairing the obligation of contracts.—Knickerbocker Trust Co. v. Cremen, U. S. C. C., D. Md., 140 Fed. Rep. 973.

42. CONSTITUTIONAL LAW—Intoxicating Liquors.—One prosecuted for violation of Acts 1902, p. 92, No. 90, regulating the sale of liquor, held not entitled to question the constitutionality of the search and seizure clauses of the statute.—State v. Paige, Vt., 62 Atl. Rep. 1017.

43. CONSTITUTIONAL LAW—Police Power.—Police power of a state embraces regulation to promote order, public convenience, or the general prosperity.—Chicago, B. & Q. Ry. Co. v People of State of Illinois, U. S. S. C., 26 Sup. Ct. Rep. 341.

44. CONSTITUTIONAL LAW—Prohibited Combinations.—Acts 1903, p. 119, ch. 94, imposing a penalty for carrying on a trust, held not unconstitutional, as impairing the obligation of contract.—State v. Missouri, K. & T. Ry. Co. of Texas, Tex., 91 S. W. Rep. 214.

45. CONSTITUTIONAL LAW—Right to Revoke Liquor License.—A license to sell intoxicating liquors does not confer a contract or vested right, but a mere permission which may be revoked at any time.—State v. Corron, N. H., 62 Atl. Rep. 1044.

46. CONSTITUTIONAL LAW—Statute as to Animals Running at Large.—Small stock law (Acts 1903, p. 408, ch. 197, as amended by Acts 1905, p. 670, ch. 316), operative only in counties adopting it by a majority vote of the people, held unconstitutional under Const. art. 11, § 8.—Wright v. Cunningham, Tenn., 91 S. W. Rep. 293.

47. CONTRACTS—Duress.—Duress in the procurement of a contract is waived by three years' silence and ac-

quiescence in the contract, without giving any indication of repudiation thereof.—Buck v. Houghtaling, 96 N. Y. Supp. 1034.

48. CONTRACTS—Meeting of Minds. — Where defendants contracted to sell coal under a belief that the purchaser was a corporation, and on ascertaining that he was an individual declined to ship the coal, there was no meeting of minds nor a valid contract of sale.—Fifer v. Clearfield & Cambria Coal & Coke Co., Md., 62 Atl. Rep. 1122.

49. CONTRIBUTION—Personal Liability. — The remedy of an owner of a part of a tract of land subject to a street assessment bond is to pay the full amount of the bond, and compel contribution from the owner of the other part.—Ellis v. Witmer, Cal., 83 Pac. Rep. 800.

50. CORPORATIONS—Check Books.—Check books of a corporation held books of entry, within Rev. Laws, ch. 208, § 58, relating to false entries.—Commonwealth v. Dewhirst, Mass., 76 N. E. Rep. 1052.

51. CORPORATIONS—Disputing Corporate Powers —In an action against a railroad company for damages arising from its negligence in conducting a telegraph business, defendant is estopped to assert that it was acting beyond its power.—Arkansas & L. Ry. Co. v. Stroude, Ark., 91 S. W. Rep. 18.

52. CORPORATIONS — Disputing Corporate Powers.— One who has contracted with a corporation is estopped to thereafter dispute its power to contract. — White River, L. & W. Ry. Co. v. Star Ranch & Land Co., Ark., 91 S. W. Rep. 14.

53. CORPORATIONS—Doing Business Within Foreign State.—The doing of a single act or the making of a single contract by a foreign corporation within the state does not constitute doing business within the state, within Const. art. 12, § 9.—A. Booth & Co. v. Weigand, Utah, 83 Pac. Rep. 784.

54. CORPORATIONS—Rights of Stockholders. — A corporation on declaring a dividend becomes indebted to each stockholder who may enforce or assign his demand as any other creditor.—Steel v. Island City Mercantile & Milling Co., Oreg., 83 Pac. Rep. 783.

55. CORPORATIONS—Right to Withdraw Unauthorized Appearance.—A corporation defendant held not entitled to withdraw a general appearance entered for it by counsel without authority where it knew of such appearance and acquiesced in the same for four months without objection. — Raymondville Paper Co. v. St. Gabriel Lumber Co., U. S. C. C., N. D. N. Y., 140 Fed. Rep. 965.

56. CORPORATIONS—Service of Process.—In an action against a foreign corporation, a request to charge that, if the secretary on whom process was served was not such at the time of service, the service was void, though he was acting as secretary, held properly refused.—Wm. Cameron & Co. v. Jones, Tex., 90 S. W. Rep. 1129.

57. CORPORATIONS — Suits by Stockholders. — Stockholder cannot enjoin alleged *ultra vires* acts of corporation after he has taken the benefits thereof.—Wormser v. Metropolitan St. Ry. Co., N. Y., 76 N. E. Rep. 1036.

58. COVENANTS—Warranties.—The mere recital in a deed of the number of acres which it purports to convey is not a warranty that the tract contains so many acres.—Rich v. Scales, Tenn., 91 S. W. Rep. 50.

59. COUNTIES—Collection of Taxes.—A county is not liable for the delinquency of a county treasurer in the collection of taxes for townships and incorporated towns in the county.—State v. Spinney, Ind., 76 N. E. Rep. 971.

60. COURTS—Jurisdiction. — Where two courts have concurrent jurisdiction of a controversy, the court first obtaining jurisdiction has the exclusive right to exercise it.—Kastor v. Elliott, Ark., 91 S. W. Rep. 8.

61. CRIMINAL EVIDENCE — Facts Obtained From Defendant's Wife.—Facts learned by competent witnesses will not be excluded because they may have been put on the track of the facts by information derived from the wife of the prisoner.—Commonwealth v. Johnson, Pa., 2 Atl. Rep. 1064.

62. CRIMINAL EVIDENCE—Habit.—Exclusion of defendant's testimony, in a homicide case, of his habit of joking, held not error.—Cross v. State, Tex., 91 S. W. Rep. 223.

63. CRIMINAL TRIAL—Similar Offenses. — On trial for embezzlement in selling certain secondhand bridge plank, evidence that witness had on another occasion bought plank from defendant was improperly admitted.—State v. Newman, N. J., 62 Atl. Rep. 1008.

64. CRIMINAL TRIAL—Statement of Facts.—In preparation and filing of bills of exceptions and a statement of facts on a criminal appeal, the parties are not entitled to rely on the mail for the transportation of the papers.—Walker v. State, Tex., 91 S. W. Rep. 229.

65. CRIMINAL TRIAL—Court Informing Jury as to Effect of Disagreement.—The court has no authority to inform the jury as to whether one juror could hang the jury because he was in favor of life imprisonment while the others desired the death penalty.—Wilkerson v. State, Tex., 91 S. W. Rep. 228.

66. CRIMINAL TRIAL—Misconduct of Juror.—Action of juror in criminal case in referring to a former conviction of defendant during retirement, but after the verdict was written, held not to require a new trial.—Tally v. State, Tex., 90 S. W. Rep. 1113.

67. CRIMINAL TRIAL—Right of State to Hire Private Counsel.—In a prosecution for homicide, it was proper for the court to state to the jury that it was competent for the state to employ private counsel, who was entitled to the same respect in the case as the county attorney.—Willis v. State, Tex., 90 S. W. Rep. 1100.

68. CUSTOM DUTIES—Passenger's Baggage. — A passenger who on entering his baggage stated the number and kind of pieces without any reference to the dutiable articles contained therein held not to have "mentioned" the dutiable articles, as required in section 2802, Rev. St. U. S. Comp. St. 1901, p. 1873.—Harts v. United States, U. S. C. C. of App., Ninth Circuit, 140 Fed. Rep. 843.

69. CUSTOMS DUTIES—Procedure of the Board of General Appraisers.—The regularity of the procedure of the board of general appraisers may not be challenged on the ground of the presence or absence of different members of the board while the testimony is being taken.—United States v. Pierce, U. S. C. C., D. Ver., 140 Fed. Rep. 962.

70. DAMAGES—Expectancy of Life. Pendency of action by parent for wages of injured son until 21 years of age held not to render inadmissible evidence of his earning capacity in action by the son.—McMahon v. Bangs, Del., 62 Atl. Rep. 1098.

71. DAMAGES—Personal Injury.—The damages recoverable for negligence are confined to those which flow from injuries that are traceable directly to the negligence charged against the one guilty of negligence as the immediate and proximate cause.—Southern Ry. Co. v. Sittasen, Ind., 76 N. E. Rep. 973.

72. DAMAGES—Question for Jury.—Whether damages were suffered by plaintiff as a direct consequence of acts of defendant, and the extent thereof, were questions for the jury.—Baltimore Belt R. Co. v. Sattler, Md., 62 Atl. Rep. 1125.

73. DEAD BODIES — Unauthorized Autopsy.— Physicians who made an autopsy without the consent of the persons entitled to the custody of the body were liable in damages, unless the autopsy was made in good faith in order to make a burial certificate from the board of health.—Meyers v. Clarke, Ky., 90 S. W. Rep. 1049.

74. DIVORCE—Desertion. — Where parties intermarry clandestinely without intent of establishing a matrimonial domicile, and on agreement to live separately for the present, the separate living of the husband held not a desertion of the wife.—McAllister v. McAllister, N. J., 62 Atl. Rep. 1131.

75. DIVORCE—Disobedience of Order.—Defendant in a divorce case held not entitled, though without the state to complain of the court's staying him from moving the case for trial till he obeys an order, entered on his writ-

ten consent, for payment of counsel fee and alimony *pendente lite*.—Harney v. Harney, 96 N. Y. Supp. 905.

76. DRAINS—Duty to Clean.—Landowners to whom the care of a portion of a public drain had been allotted held not entitled to negligently suffer the same to be obstructed, and under the guise of new work compel others to contribute to the expense of repairing the same.—Beery v. Driver, Ind., 76 N. E. Rep. 967.

77. EJECTMENT—Title in Third Person.—Where plaintiff in ejectment establishes an interest in land paramount to that of defendant, the latter cannot avail himself of an outstanding title in a stranger.—McBride v. Steinweden, Kan., 83 Pac. Rep. 822.

78. EMINENT DOMAIN—Damages.—Where a water company sought to condemn land, the landowner may show that his property was adapted from the natural formation of the land and other causes to reservoir purposes.—Brown v. Forest Water Co., Pa., 62 Atl. Rep. 1078.

79. EMINENT DOMAIN—De Facto Corporations.—A *de facto* corporation may maintain proceedings under the power of eminent domain.—Morrison v. Indianapolis & W. Ry. Co., Ind., 76 N. E. Rep, 961.

80. EMINENT DOMAIN—Notice to Property Owners in Condemnation Proceedings.—Notices provided for in proceedings by a city to condemn property for dock purposes held reasonable and not to render the proceedings invalid as in violation of the constitutional rights of property owners.—Dyer v. City of Baltimore, U. S. C. C., D. Md., 140 Fed. Rep. 880.

81. ESCROWS—Fulfillment of Conditions.—On the fulfillment of the conditions of an escrow agreement, the deed relates back to the date of making the escrow agreement for the purpose of cutting off any intervening rights acquired by a third person with notice of the escrow.—Whitmer v. Schenk, Idaho, 83 Pac. Rep. 775.

82. EVIDENCE—Hearsay.—In an action by an engineer against a railroad company for injuries, evidence of the station agent as to his instructions from the train dispatcher, which instructions he transmitted to plaintiff, was not objectionable as hearsay.—Galveston, H. & S. A. Ry. Co. v. Fitzpatrick, Tex., 91 S. W. Rep. 355.

83. EVIDENCE—Negligent Blasting.—Witness held not competent as an expert as to whether there was any method to protect persons, where blasting was being carried on in a stone quarry, from injury by flying fragments of rock.—McMahon v. Bangs, Dela., 62 Atl. Rep. 1098.

84. EVIDENCE—Parol Reservations not in Deed.—Parol evidence of a reservation of rents of land conveyed for the current year held not objectionable as cotradicting a deed containing no such reservation.—Applegate v. Kilgore, Tex., 91 S. W. Rep 288.

85. EVIDENCE—Unproved Deeds.—The record of an unproved ancient deed or contract of sale held admissible with other evidence, in trespass to try title, to show a sale of the land in controversy.—Veatch v. Gray, Tex., 91 S. W. Rep. 324.

86. EXECUTION—Railroad Property.—Property essential and necessary to the existence of a railroad company and in actual use cannot be sold under an ordinary writ of *fieri facias*.—Margo v. Pennsylvania R. Co., Pa., 62 Atl. Rep. 1081.

87. EXECUTORS AND ADMINISTRATORS—Accounting.—Executrix and devisee of life estate held chargeable on the settlement of her account with sums received for timber cut and sold above what was necessary for the payment of debts and expenses of the estate.—Linzy v. Whitney, 96 N. Y. Supp 1075.

88. EXECUTORS AND ADMINISTRATORS—Family Allowances.—A widow to whom a family allowance has been paid by order of the court held not accountable to the children after their majority for shares not expended for their support (Code Civ. Proc., §§ 1467, 1468).—Bell v. Bell, Cal., 83 Pac. Rep. 814.

89. EXECUTORS AND ADMINISTRATORS—Possession of Personal Property.—Personal property of an intestate passes to the heirs subject to the control of the probate court and to the possession of the administrator.—Litz v. Exchange Bank of Alva, Okla., 83 Pac. Rep. 790.

90. EXECUTORS AND ADMINISTRATORS—Subjection of Property to Payment of Debts.—Where real and personal property of a deceased person had been specifically devised and bequeathed, both should contribute equally to the payment of debts.—Bashaw v. Temple, Tenn., 91 S. W. Rep. 202.

91. FEDERAL COURTS—Transfer of Cause of Action.—The fact that a cause of action was transferred to a citizen of another state for the purpose of enabling him to bring suit thereon in a federal court does not defeat the jurisdiction of said court where the transfer was *bona fide* and absolute.—Cole v. Philadelphia & E. Ry. Co., U. S. C. C., E. D. Pa., 140 Fed. Rep. 944.

92. FIRE INSURANCE—Conditions of Policy.—Insurance company accepting premium with knowledge of occupancy of building by tenant held not entitled to claim invalidity of policy on that ground.—Ohio Farmers' Ins. Co. v. Vogel, Ind., 76 N. E. Rep. 977.

93. FRAUD—False Representations.—In an action for deceit based on false representations made in a sale of property, where the sale was a single transaction embracing different items of property, there can be no recovery unless it is shown that the property as a whole is worth less than the price paid.—Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., U. S. C. C., W. D. Pa., 140 Fed. Rep. 888.

94. FRAUDS, STATUTE OF—Contract to Devise.—A contract to leave property to another in consideration of an agreement to support the owner during his life is within the scope of the statute of frauds.—Russell v. Sharp, Mo., 91 S. W. Rep. 134.

95. FRAUDS, STATUTE OF—Necessity of Memorandum.—A promise to pay a certain sum as long as the promisee resides in a certain place does not require a memorandum under the statute of frauds.—Burgesser v. Wendel, N. J., 62 Atl. Rep 994.

96. GAME—Violation of Game Laws.—The affidavit on which a warrant was issued for the arrest of defendant for violating the provision of the game law construed, and held valid.—People v. Hesterberg, N. Y., 76 N. E. Rep. 1032.

97. GUARANTY—Construction.—Guarantor of payment of a note held liable without exhaustion of remedies against maker or insolvency of maker.—Walter A. Wood Reaping & Mowing Mach. Co. v. Ascher, Md., 62 Atl. Rep. 1023.

98. GUARDIAN AND WARD—Testamentary Guardian.—A husband's common-law power to appoint a testamentary guardian for his children, though their mother survived, held abrogated by statute.—Kellogg v. Burdick, 96 N. Y. Supp. 965.

99. GROUND RENTS—Payment.—Payment of ground rent and recitals in deeds held sufficient to raise a presumption of the creation of the ground rent.—Braunstein v. Black, Dela., 62 Atl. Rep. 1091.

100. HABEAS CORPUS—Federal Interference with State Courts.—Federal courts have no power to interfere by *habeas corpus* with imprisonment under a conviction in a state court, if the court had jurisdiction of the case and the party.—Valentina v. Mercer, U. S. S. C., 26 Sup. Ct. Rep. 868.

101. HIGHWAYS—Obstruction and Suit by Abutting Owner.—An abutting owner on a highway has no right to an injunction restraining an obstruction opposite his premises which does not interfere with his right of access.—Rutherstrom v. Peterson, Kan., 83 Pac. Rep. 825.

102. HIGHWAYS—Viewer's Report.—A report of viewers in a proceeding to establish a public road held to show procedure in accordance with Burns' Ann. St. 1901, § 6748.—Baker v. Gowland, Ind., 76 N. E. Rep. 1027.

103. HOMESTEAD—What Constitutes.—Where land is purchased with an intent to make it a homestead, and immediately occupied by the purchaser, a judgment at the time of the purchase will not become a lien thereon.—Stowell v. Kerr, Kan., 83 Pac. Rep. 827.

104. HUSBAND AND WIFE—Abandonment of Wife.—In an action on a bond given to secure the payment of a sum to abandon wife, evidence that defendant, after conviction, offered to live with his wife, held inadmissible.—Tully v. Stout, 96 N. Y. Supp. 1080.

105. HUSBAND AND WIFE—Judgments Against Wife.—The failure of a judgment against a husband and wife to specifically authorize execution against the wife's separate property does not invalidate it or prevent satisfaction thereof out of such property.—Love v. McGill, Tex., 91 S. W. Rep. 246.

106. INJUNCTION—Breach of Contract.—Manufacture of specialties in violation of contract will be enjoined at the suit of the other party to the contract.—S. Jarvis Adams Co. v. Knapp, Pa., 62 Atl. Rep. 1112.

107. INJUNCTION—Burden of Showing Contempt.—The burden of proof to establish the violation of an injunction rests upon the complainant, and the defendant is entitled to the benefit of every reasonable doubt.—General Electric Co. v. McLaren, U. S. C. C., D. N. Jer., 140 Fed. Rep. 876.

108. INTOXICATING LIQUORS—Transfer of License.—A resolution of a board of excise commissioners transferring a liquor license to one of its members who was present and voted for the resolution is voidable on certiorari.—Treeftz v. Board of Excise Com'rs of City of Lambertville, N. J., 62 Atl. Rep. 1004.

109. JUDGMENT—Decree of Foreign Court.—A court is without power to adjudge the decree of any other court binding, or punish for the violation thereof.—S. Jarvis Adams Co. v. Knapp, Pa., 62 Atl. Rep. 1112.

110. JURY—Summoning.—That the sheriff in summoning jurors failed to state that they were to serve in the oyer and terminer is no ground for setting aside a conviction.—Commonwealth v. Johnson, Pa., 62 Atl. Rep. 1064.

111. LANDLORD AND TENANT—Assignment of Lease.—Assignor of lease held not entitled to avoid transfer of interest in security for payment of rent on ground that she could not read English and did not know that she was transferring such security.—Wackerow v. Engel, 96 N. Y. Supp. 1071.

112. LANDLORD AND TENANT—Deposit for Security.—Persons receiving deposit as security for execution of lease held not entitled to retain it, in absence of showing that he suffered damage from failure to execute lease.—Rosenfeld v. Silver, 96 N. Y. Supp. 1027.

113. LANDLORD AND TENANT—Duty to Repair.—A landlord held not liable for damages to an adjoining building by the discharge of water from a defective rain spout on the leased building—Mylander v. Beimschla, Md., 62 Atl. Rep. 1038.

114. LANDLORD AND TENANT—Subletting.—A tenant held not to have assigned his lease, but to have made a sublease, and therefore to be entitled to recover the possession on nonpayment of rent.—Shumer v. Hurwitz, 96 N. Y. Supp. 1026.

115. LIBEL AND SLANDER—Punitive Damages.—Corporation publishing newspaper held not liable, under the circumstances, to punitive damages for the publication of a libel.—Neafie v. Hoboken Printing & Publishing Co., N. J., 62 Atl. Rep. 1129.

116. LICENSES—Revocation.—A parol license to construct an irrigation ditch over plaintiff's land held irrevocable after defendant had expended a large sum of money in constructing the ditch under the license.—Stoner v. Zucker, Cal., 83 Pac. Rep. 808.

117. LIFE INSURANCE—Rights of Beneficiary.—A beneficiary under a life policy held not entitled to recover for breaches by the insurance company of its contract with insured.—Price v. Mutual Reserve Life Ins. Co., Md., 62 Atl. Rep. 1040.

118. MALICIOUS PROSECUTION—Damages.—The prosecution of a civil suit maliciously and without reasonable or probable cause, etc., held to entitle the successful defendant to an action for damages.—Whitesell v. Judy, Ind., 76 N. E. Rep. 1010.

119. MANDAMUS—Alternative Writ.—Including in the mandatory clause of an alternative writ of mandamus, a command for greater relief than the relator is entitled to under his petition and writ renders the same insufficient.—Advisory Board of Harrison Tp. v. State, Ind., 76 N. E. Rep. 986.

120. MANDAMUS—Public Funds.—Mandamus will not lie to compel payment of town funds by a county treasurer to a town treasurer if the county treasurer has no such funds in his possession.—State v. Spinney, Ind., 76 N. E. Rep. 971.

121. MARSHALING ASSETS AND SECURITIES—Interest.—Where plaintiff prevented the delivery of certain tin plate to a senior lien holder, plaintiff was properly charged with interest on the value thereof during the time it was so retained.—Pope v. Baltimore Warehouse Co., Md., 62 Atl. Rep. 1119.

122. MASTER AND SERVANT—Assumed Risk.—A servant held not entitled to recover for injuries owing to her hand having been drawn into a laundry mangle.—Burke v. Davis, Mass., 76 N. E. Rep. 1089.

123. MASTER AND SERVANT—Assumed Risk.—In an action for injuries to a servant, evidence considered, and held, that the question whether the servant was operating a certain saw with defendant's permission was one for the jury.—Rahn v. Standard Optical Co., 96 N. Y. Supp. 1080.

124. MASTER AND SERVANT—Assumed Risk.—Servant employed to unload coal from vessel held to assume risk of injury from apparatus in use when he was employed.—Sullivan v. New Bedford Gas & Edison Light Co., Mass., 76 N. E. Rep. 1048.

125. MASTER AND SERVANT—Contributory Negligence.—In an action for injuries to a minor servant while operating a circular saw, questions of contributory negligence and assumption of risk were to be considered in connection with his age.—Rahn v. Standard Optical Co., 96 N. Y. Supp. 1080.

126. MASTER AND SERVANT—Defective Appliances.—A servant is not required to use ordinary care to ascertain whether appliances and instrumentalities furnished by a master are reasonably safe, and that the business is conducted in a reasonably safe manner.—Galveston, H. & S. A. Ry. Co. v. Udalle, Tex., 91 S. W. Rep. 330.

127. MASTER AND SERVANT—Fellow Servants.—A railroad brakeman held not entitled to recover for injuries sustained by the negligence of the fireman in throwing fresh coal into the boiler, contrary to custom, while the train was on a downgrade, etc.—Johnson v. Boston & M. R. R., Vt., 62 Atl. Rep. 1021.

128. MASTER AND SERVANT—Negligence of Fellow Servant.—Where a brakeman was injured by being thrown from roof of car it was not necessary for him to allege in his complaint that the conductor knew of his perilous position—Pittsburgh, C., C. & St. L. Ry. Co. v. Nicholas, Ind., 76 N. E. Rep. 522.

129. MINES AND MINERALS—Rights of Life Tenant.—A person in possession of the surface of land containing gas or petroleum held not entitled to mine the same, unless such right has been acquired from the owner of the fee.—Richmond Natural Gas Co. v. Davenport, Ind., 76 N. E. Rep. 525.

130. MONEY RECEIVED—Defenses.—In an action for money had and received, where defendant by fraud prevents the receipt by him of the money in the hands of a third person, he cannot plead that he has not received it.—Owens v. Goldie, Pa., 62 Atl. Rep. 1117.

131. MORTGAGES—Right of Doweress.—A widow redeeming from a mortgage in which she joined cannot be required to pay a second mortgage in which she did not join, or to pay an open account due the first mortgagee.—Hays v. Cretin, Md., 62 Atl. Rep. 1028.

132. MUNICIPAL CORPORATIONS—Assessment for Street Improvements.—On appeal from report of viewers assessing damages for improving street, damages for widening under another ordinance cannot be set off.—Duquesne Borough v. Keeler, Pa., 62 Atl. Rep. 1071.

133. MUNICIPAL CORPORATIONS—Assessment Proceed-

ings for Local Improvements. — A special assessment judgment for the "special assessment, printers' fees, and costs," is not subject to the objection of allowing a double recovery for printers' fees.—Gage v. People, Ill., 76 N. E. Rep. 498.

134. MUNICIPAL CORPORATIONS — Building Wharves and Docks.—A legislative grant of power to a city "to lay out additions and alterations to be made to the public wharves and docks" of the city, made after the existing structures and buildings along the water front had been destroyed by fire, includes power to enlarge the facilities of the port by building new and additional wharves and docks.—Dyer v. City of Baltimore, U. S. C. C., D. Md., 140 Fed. Rep. 880.

135. MUNICIPAL CORPORATIONS—Collection of Special Taxes.—In a suit to restrain the collection of certain city taxes, evidence held insufficient to show that complainant's property had been fraudulently overvalued.—National Tube Co. v. Shearer, Del., 62 Atl. Rep. 1093.

136. MUNICIPAL CORPORATIONS—Construction of Ordinance —The words "to hire," as used in an ordinance forbidding any person to hire rolling chairs, means to grant the temporary use for compensation.—Harris v. Atlantic City, N. J., 62 Atl. Rep. 995.

137. MUNICIPAL CORPORATIONS—Defective Streets.—Where a person uses a defective street, whether he was guilty of contributory negligence in not using another street was a question for the jury.—Steck v. City of Allegheny, Pa., 62 Atl. Rep. 1115.

138. MUNICIPAL CORPORATIONS — Enforcement of Assessments.—The holder of a void certificate of sale to pay a street assessment bond, constituting a lien on a tract owned by two persons, held entitled to demand payment in full before discharging the lien from any part of the land.—Ellis v. Witmer, Cal., 83 Pac. Rep. 800.

139. MUNICIPAL CORPORATIONS—Enforcement of Assessments.—Where appellant from a judgment and order of sale in special assessment proceedings fails to set out any part of the assessment ordinance in his abstract, the supreme court will not search the record for alleged defects in such ordinance.—Ottis v. Sullivan, Ill., 76 N. E. Rep. 487.

140. MUNICIPAL CORPORATIONS — Improvements.—An order of the supreme court, setting aside an assessment and directing a new assessment, vacates only the particular apportionment under review, and does not determine that the amount of the assessment on any individual's property should be affected.—Milton v. Stell, N. J., 62 Atl. Rep. 1132.

141. MUNICIPAL CORPORATIONS—Removal of Garbage.—An ordinance which limits the use of the public streets for the collection of garbage to the duly authorized contractor of the city held a valid exercise of the police power.—Atlantic City v. Abbott, N. J., 62 Atl. Rep. 999.

142. MUNICIPAL CORPORATIONS—Right to Erect Awnings —Application for permit to erect awning held not within ordinance authorizing inspector of buildings to grant permit to erect awning covered with wood, iron, tin, or canvas.—Preston v. Likes, Bewanger & Co., Md., 62 Atl. Rep 1024.

143. NAVIGABLE WATERS—Islands. — In determining whether a formation in a river is an island or a part of the shore land, account should be taken of the stability of the formation and the permanence of the channels around it.—McBride v. Steinweden, Kan., 83 Pac. Rep. 822.

144. NEGLIGENCE—Contributory Negligence.—Where a party by his own acts creates a controlling presumption of contributory negligence, he is guilty thereof as a matter of law.—Lofsten v. Brooklyn Heights R. Co., N. Y., 76 N. E. Rep. 1035.

145. NEGLIGENCE—Duty Toward Licensees.—Act of owner of land in permitting public to use the same as a crossing held not to impose on contractor excavating on the land the duty of guarding the excavation.—Crimmins v. United Engineering & Contracting Co., 96 N. Y. Supp. 1032.

146. NEGLIGENCE — Independent Contractors —In an action for injuries to a pedestrian through the fall of a brick from a building the question as to the party having complete control of the bricklaying held one for the jury.—Decola v. Cowan, Md., 62 Atl. Rep 1026.

147. NEGLIGENCE—Personal Duties. — Person who is given temporary control of a sidewalk cannot delegate his duty of maintaining the sidewalk in a reasonably safe condition to an independent contractor.—Lubelsky v. Silverman, 96 N. Y. Supp. 1056.

148. NEW TRIAL—Verdict Against Evidence.—It is reversible error for judge to fail to set a verdict aside which was "shocking to every fair sense of justice and right."—Dinan v. Supreme Council Catholic Mut. Ben. Ass'n, Pa., 62 Atl. Rep. 1067.

149. PAYMENT—Ground for Recovery of Payment.—Where collateral is pledged to secure the payment of money, the burden is on the pledgor to show that payments made by him are extorted from him by threat of an illegal sale of the collateral.—Buck v. Houghtaling, 96 N. Y. Supp. 1034.

150. PLEADING—Variance.—In an action against trustees of church, complaint alleging contract by a committee authorized to execute it held not supported by proof of subsequent ratification of contract —Ashley v. Henderson, Ind., 76 N. E. Rep. 985.

151. PLEADING—Written Instruments. — The implied admission of the execution of a contract as alleged, contained in a plea that it was obtained by fraud, held ineffective to disprove the issues presented by other disconnected pleas.—Fifer v. Clearfield & Cambria Coal & Coke Co., Md., 62 Atl. Rep. 1122.

152. PRINCIPAL AND SURETY — Authority to Deliver Uncompleted Bond.—A principal's authority to deliver an uncompleted bond as the act and deed of certain sureties, who had signed it, may be implied from the sureties' acts and conduct.—Baker County v. Huntington, Oreg., 83 Pac. Rep. 532.

153. PRINCIPAL AND SURETY—Limitations.—That limitations have run against a debt for which a bond was given as security does not release the surety on the bond.—United States v. Mercantile Trust Co., Pa., 62 Atl. Rep. 1062.

154. PROCESS—Abuse.—The fact that defendant maliciously caused the issuance of process against plaintiff gave no cause of action where the issuance was within defendant's rights.—Whitesell v. Study, Ind., 76 N. E. Rep. 1010.

155. PUBLIC LANDS—Mining Claims.—An occupier of mineral land belonging to the United States, who takes no steps to acquire title or right to possession, has no valid claim of possession or of compensation for improvements as against a patentee from the government. —Helstrom v. Rodes, Utah, 83 Pac. Rep. 730.

156. PUBLIC LANDS—Notice of Forfeiture.—A sheriff's return of service of notice of forfeiture of school land contracts, which states that he "found no one in possession" of the land held not a return that no one was in possession.—True v. Brandt, Kan., 83 Pac. Rep. 826.

157. RAILROADS—Fires Set by Engine.—In an action for injuries to property from smoke and cinders from defendant's engines, an instruction that plaintiff could not recover if after the institution of the suit the drawing of engines over the tracks of the railroad had ceased was erroneous.—Baltimore Belt R. Co. v. Sattler, Md., 62 Atl. Rep. 1125.

158. RAILROADS—Joint Liability for Injury to Passenger —A passenger on the train of one company may recover from another company for an injury resulting from a collision at a crossing caused by the negligent backing of a train of the latter into a car of the former.—Baltimore & O. S. W. R. Co. v. Kleespies, Ind., 76 N. E. Rep. 1015.

159. RAILROADS—Rights in Land.—The fact that trustees under a railroad mortgage pay no attention to certain land belonging to the railroad held not to prove an

abandonment of such land.—Enfield Mfg. Co. v. Ward, Mass., 76 N. E. Rep. 1058.

160. REMOVAL OF CAUSES—Jurisdictional Amount.—A trustee or receiver in bankruptcy cannot remove a cause into a federal court on the ground that it is one arising under the laws of the United States, unless it clearly appears that the jurisdictional amount of $2,000 is involved. —Swofford v. Cornucopia Mines of Oregon, U. S. C. C., D. Oreg., 140 Fed. Rep. 957.

161. REPLEVIN—Pleading.—It is not permissible to declare in trover when the action is in replevin.—King v. Morris, N. J., 62 Atl. Rep. 1006.

162. SALES—Ambiguity as to Time of Delivery.—The phrase "as soon as possible," in a contract for the purchase of bicycles, held to bind the vendor to deliver the same within a reasonable time.—Williams v. Gridley, 96 N. Y. Supp. 978.

163. SEARCHES AND SEIZURES—Books and Papers of Corporation.—Protection against unreasonable searches and seizures, afforded by Const. U. S. Amend. 14, held not to justify refusal of officer of corporation to produce its books and papers in aid of investigation by grand jury of violation of Anti-Trust Act July 2, 1890, ch. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].—Hale v. Henkel, U. S. S. C., 26 Sup. Ct. Rep. 370.

164. SHERIFFS AND CONSTABLES — Attachment. — A sheriff, to justify his seizure under attachment and his possession, must allege all the jurisdictional facts justifying his right of possession.—Beckstead v. Griffith, Idaho, 83 Pac. Rep. 764.

165. STATES—Boundaries.—Where the Missouri river is designated as part of the boundary between Kansas and Missouri, the middle of the main channel is the boundary line, and, if the river shifts, the boundary will change with the river. —McBride v. Steinweden, Kan., 83 Pac. Rep. 822.

166. STATUTES—Validity Where Signed After Adjournment of Legislature.—Whether a public law is invalid because approved by the governor after adjournment of the legislature is not to be determined on the stipulation of parties as to the facts.—Morris v. City of Newark, N. J., 62 Atl. Rep. 1005.

167. STREET RAILROADS—Frightening Horses.—In an action against a street railway company for injuries to a traveler in consequence of his horse being frightened by a street car, the question of the motorman's negligence held for the jury.—Dulin v. Metropolitan St. Ry Co., Kan., 83 Pac. Rep. 821.

168. STREET RAILROADS—Injury to Passenger —Where plaintiff had not been accepted as a passenger on a street car at the time he was injured while attempting to alight, the carrier was only bound to exercise ordinary care to prevent such injury.—Robertson v. Boston & N. St. Ry. Co., Mass., 76 N. E. Rep. 513.

169. STREET RAILROADS — Negligence.—The fact that street car horses broke from the driver and injured plaintiff, held insufficient to establish the railroad company's negligence.—Cunningham v. Dry Dock, E. B. & B. R. Co., 96 N. Y. Supp. 1070.

170. STREET RAILROADS — Negligence. — In an action against a street railroad company for injuries to plaintiff's horse, which it was alleged was frightened by one of defendant's cars, evidence held to justify submission to the jury of the question of defendant's negligence.—Joyce v. Exeter, H. & A. St. Ry. Co., Mass., 76 N. E. Rep. 1054.

171. STREET RAILROADS—Riding on Running Board.—A carrier having permitted plaintiff to ride on the running board of a street car as a passenger held bound to exercise extraordinary care to transport her without injury.—Horan v. Rockwell, 96 N. Y. Supp. 973.

172. TELEGRAPHS AND TELEPHONES—Use of Streets.—A village has no power to compel a telephone company to place its wires underground in the same streets in which it permits a company to use poles and open air construction.—Village of Carthage v. Central New York Telephone & Telegraph Co., 96 N. Y. Supp. 917.

173. TRADE-MARKS AND TRADE NAMES—Suit for Infringement.—The fact that the infringement of a trademark had ceased before the service of process in a suit in equity therefor does not deprive the court of jurisdiction where the bill alleges a threatened and intended continuance of such infringement, which allegation was justified by the facts.—Saxlehner v. Eisner, U. S. C. C., S. D. N. Y., 140 Fed. Rep. 938.

174. TRESPASS—Bees.—Trespass *quare clausum fregit* is an inappropriate remedy to recover for injuries done by bees to the property of another.—Petey Mfg. Co. v. Dryden, Dela., 62 Atl. Rep. 1056.

175. TRIAL—Defective Verdict.—Where jury returned a single sum as damages, when the declaration contained a claim by a husband in his own right, added to a claim of the husband and wife, held, that the court, on application of the plaintiff, will award a writ of *venire de novo*. —Spencer v. Haines, N. J., 62 Atl. Rep. 1009.

176. VENDOR AND PURCHASER—Contract for Sale of Realty.—A party accepting a contract to purchase real estate held to have no power to sell the timber on the land, with permission to remove the same, until the contract is completed —Gumaer v. White Pine Lumber Co., Idaho, 83 Pac. Rep. 771.

177. WAREHOUSEMEN — Warehouse Receipts. — *Bona fide* holders of warehouse receipts have no right to the property on which they purport to be issued as against the real owner, if it was not in fact in the possession of the warehouseman when the receipts were issued.—Whitney v. Wenman, U. S. D. C., S. D. N. Y., 140 Fed. Rep. 959.

178. WATERS AND WATER COURSES—Irrigation Districts.—The validity of proceedings for the establishment of an irrigation district cannot be attacked collaterally in a suit to recover possession of land sold for nonpayment of irrigation taxes.—Purdin v. Washington Nat. Bldg. Loan & Investment Assn., Wash., 83 Pac. Rep. 728.

179. WATERS AND WATER COURSES—Pollution.—In an action for damages to plaintiff's land from a continued nuisance, consisting of the pollution of a stream flowing through the land, the measure of damages stated.—Muncie Pulp Co. v. Keesling, Ind., 76 N. E. Rep. 1002.

180. WILLS—Charge on Devisee.—Under will making provision for care of testator's mother, a brother of testator held entitled to compensation for her care out of the estate, and a portion of the burden held properly imposed on testator's widow.—Linzy v. Whitney, 96 N. Y. Supp. 1075.

181. WILLS—Construction.—A bequest to one for life with remainder to his children gives a vested remainder to each child who is alive at the death of testator.—Crapo v. Price, Mass., 76 N. E. Rep. 1043.

182. WILLS—Gift of Income.—Where the income of an estate or any portion thereof is given to a legatee for life, the legatee is entitled to the income accruing thereon after the death of testator.—Bank of Niagara v. Talbot, 96 N. Y. Supp. 976.

183. WILLS—Nature of Estate Devised.—Where testator gave "to my son and his heirs after him all my real estate," the son took an estate in fee simple.—Nesbit v. Skelding, Pa., 62 Atl. Rep. 1062.

184. WITNESSES — Cross-Examination. — Counsel has the right on cross-examination to assume that some previous answer of the witness is untrue, and to put his questions in various forms to show that fact.—Briggs v. People, Ill., 76 N. E. Rep. 499.

185. WITNESSES—Fires Set by Railroad Engine.—In an action against a railroad for injuries to plaintiff's property from smoke and cinders from defendant's engine, defendant held not injured by the exclusion of certain evidence.—Baltimore Belt R. Co. v. Sattler, Md., 62 Atl. Rep. 1125.

186. WITNESSES—Privileged Communications.—Communications of attorney in presence of third person held not privileged, under Code Civ. Proc., § 835.—*In re* Simmons' Estate, 96 N. Y. Supp. 1103.